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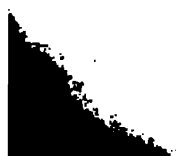
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THE
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+ 14 A
REPORTS OF CASES

ARGUED AND ADJUDGED IN

THE SUPREME COURT

OF THE

DISTRICT OF COLUMBIA,

SITTING IN GENERAL TERM,

FROM OCTOBER, 1883, TO MARCH, 1885.

REPORTED BY

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ERRATA.

Page 388, 2d line of syllabus. For "is" read *arc*.

Same page, 5th line of syllabus. Insert comma instead of period, after "years."

Page 393, 2d line of syllabus. Insert comma instead of semi-colon, after "cause."

NOTE.—The cases in this volume have been arranged in the order of their dates as far as practicable. This rule will be followed in all succeeding volumes.

REPORTS OF CASES

DECIDED IN THE

Supreme Court of the District of Columbia.

PHILANDO C. LANGDON *vs.* CHARLES E. EVANS.

LAW. No. 11,960.

{ Decided November 15, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

1. A written contract which is free from ambiguity cannot be explained or varied by parol evidence.
2. The rulings of the court below as to the order in which evidence shall be offered during the trial, are within the discretion of the presiding judge, and are not the subject of appeal.
2. An estoppel need not be specially pleaded ; it may be offered under the general issue.
4. But where the record of a judgment is offered in evidence in estoppel, and the identity of the parties, of the subject-matter, and of the pleadings, is not shown on the face of the record, it must be established by extrinsic proof before the record is admissible.
5. And where such extrinsic evidence is offered, it is competent for the other side to adduce evidence in reply.
6. But where the plea is the general issue, the plaintiff cannot, in his case in chief, offer evidence in estoppel in anticipation of a supposed defence of the defendant, since, *non constat*, that the defendant may make such defence.
7. The credibility of a witness is open to impeachment by proof that he had made a statement before a Congressional committee on a designated day at variance with his present testimony, but this cannot be done by reading for that purpose the alleged testimony from a page in an unauthenticated book styled a Congressional investigation.
8. A conviction and sentence for a felony in the State of New York does not render the party incompetent as a witness in the courts of this District, that State being, *quoad hoc*, a foreign jurisdiction.
9. An exception contained the charge of the court and stated "and to so much of the said instructions granted by the court, on its own motion, as are contained in brackets," plaintiff excepts, &c., upwards of two pages of the charge were thus contained in "brackets ;"

Held, that the exception being a wholesale one—pointing out no particular remark in the charge as incorrect—did not properly present to this court any question which it was called upon to examine.

THE CASE is stated in the opinion.

H. H. WELLS, for plaintiff, cited :

1 Gr. Ev., §§ 283, 300 ; 2 Pars. Cr., 566 ; Wright *vs.* Pond, 10 Conn., 255 ; Carter *vs.* Holman, 6 Mo., 498 ; 2 Pars. Cr. (5th ed.), 560, and cases cited in note *g*, *et seq.* ; Bradley *vs.* A., W. & G. Steam Packet Co., 13 Pet., 97 ; Phelps *vs.* Closen, 1 Wool., 204 ; Kock *vs.* Dunckle, 90 Pa. St., 264 ; Steadman *vs.* Taylor, 77 N. C., 134 ; Jones *vs.* Dove, 6 Org., 188 ; S. Falls M. Co. *vs.* Goddard, 14 How., 446 ; Atkinson *vs.* Cummins, 9 How., 479 ; 2 Pars. Cr., 513, and note *o* ; Boyle *vs.* Colman, 13 Barb., 42 ; Hanley *vs.* Cole, 27 Me., 35 ; Underhill *vs.* New York, &c., 21 Barb., 489 ; 1 Gr. Ev., § 51*a* ; McAllister's Case, 11 Shep., 139, and cases cited in the note to the last section ; Carrol *vs.* Granite, &c., 11 Md., 399 ; Hatton *vs.* McElesh, 6 Md., 407 ; Hall *vs.* Patterson, 51 Pa., 289 ; Woodman *vs.* Dana, 52 Me., 9 ; Hopkins *vs.* Lee, 6 Wh., 109, 114 ; Asplen *vs.* Nixon, 4 How., 467—497 ; Wash., A. & G. S. P. Co. *vs.* Sickles, 24 How., 333—342 ; Young *vs.* Black, 7 Cr., 565 ; Wood *vs.* Jackson, 8 Wend., 10 ; Lawrence *vs.* Hunt, 10 Wend., 80 ; Boynton *vs.* Morril, 111 Mass., 4 ; Hood *vs.* Hood, 110 Mass., 463 ; Boloit *vs.* Morgan, 7 Wall, 619 ; City of Sacramento *vs.* Fowle, 21 Wall., 120 ; Cromwell *vs.* County of Sac, 94 U. S., 351 ; Campbell *vs.* Rankin, 99 U. S., 261 ; Davis *vs.* Brown, 94 U. S., 423 ; Castle *vs.* Noyes, 14 N. Y., 329 ; Young *vs.* Bonnell, 2 Hill, 478 ; Hampton *vs.* McConnell, 3 Wh., 234 ; McElmory *vs.* Cohen, 13 Pet., 312 ; Miles *vs.* Duryee, 7 C., 481 ; Conrad *vs.* Griffey, 16 How., 38 ; Many *vs.* Jogger, 1 Blatch. C. C., 372 ; Angus *vs.* Smith, 1 M. and Malk, 473 ; Crowley *vs.* Paige, 7 Car. & P. 789 ; 1 Wh. Cr. Law, § 762.

EUGENE CARUSI and B. E. VALENTINE, for defendant, cited :

Russell *vs.* Place, 4 Otto, 606 ; Etheridge *vs.* Osborne, 2 Wend., 399, 62 N. Y., 374 ; Gr. Ev., vol. 1, sec. 376. Commonwealth *vs.* Green, 17 Mass. 515, 539—549 ; Beaver *vs.*

Taylor, 3 Otto, 46-55; Rogers *vs.* The Marshal, 1 Wall., 644; R.R. Co. *vs.* Varrell, 8 Otto, 379-482; Newell *vs.* Doty, 33 N. Y., 83.

Mr. Justice HAGNER delivered the opinion of the court.

This is an action of replevin instituted by the plaintiff to obtain possession from the defendant of sundry chattels mentioned in the declaration, consisting of steam engines, composition kettles, asphalt, &c., &c., situated in the works of the Evans Paving and Artificial Stone Co., at 17th street, and on Easby's wharf, in Washington, of the value of \$15,000. The property was, under the writ, delivered to the plaintiff. The defendant pleaded the general issue, and the jury found a verdict in favor of the defendant for \$12,500. To the rulings of the court at the trial, sundry exceptions were taken on the part of the plaintiff.

1st exception. The plaintiff, to support the issues on his part, read in evidence articles of agreement between the defendant and one Theodore A. Stratton, dated December 1, 1873. By the first paragraph, Evans contracted to sell to Stratton all that part of the business of the Evans Concrete Paving Company which was situated in the city of Washington, together with all the machinery, &c., and materials and the good will of the business, to be clear of incumbrances, at the price of \$131,750, which was to be paid by the conveyance by Stratton to Evans of five parcels of land in the town of Monterey, county of Berkshire, Mass., containing together 810 acres, with the appliances thereon for making maple sugar; the conveyances to contain general warranty of title. By the agreement it was further contracted that Evans was to sell to Stratton another lot of machinery, tools, materials, &c., and all the other personal property described in a schedule annexed, pertaining to the business known as the Evans Roofing and Paving Company, situated in the city of Brooklyn; to be free of incumbrances; and this Brooklyn property was to be paid for by the conveyance from Stratton to Evans of another piece of land in the same town in Massachusetts containing 723 acres. It

was further agreed that Stratton should promptly furnish the necessary material for finishing all uncompleted work in the city of Brooklyn and in the District of Columbia, previously contracted for by Evans; and for keeping in repair the work already finished. The plaintiff then read in evidence a bill of sale from Evans to Stratton, dated December 8, 1873, transferring the business at Brooklyn and the machinery, &c., "as per schedule hereunto annexed and made part of this bill of sale;" and also another bill of sale from Evans to Stratton, dated December 5, 1873, of all the machinery, material, &c., in the city of Washington, described in the agreement. "And in further support of said issues and to establish his title to the goods and chattels mentioned in the declaration," he offered in evidence another bill of sale, from Stratton to the plaintiff Langdon, dated December 29, 1873, in these words:

"For and in consideration of the sum of *sixty* thousand dollars to me in hand paid by Philando C. Langdon, and for other valuable considerations, the receipt whereof is hereby acknowledged, I do hereby assign, transfer and set over unto the said Philando C. Langdon, his executors, administrators and assigns, the business at Brooklyn, Kings county, State of New York, and Washington, D. C., known as the 'Evans Concrete Paving Company,' and the 'Evans Roofing Company,' with all the machinery, tools, implements and personal property, the same property which was conveyed, sold, delivered and transferred to me by Chas. E. Evans by bill of sale dated the eighth day of December, A. D. 1873, and which will more fully appear by the schedule annexed to the bill of sale made by said Evans, and which is made part of this bill of sale."

To the introduction in evidence of this paper writing, the defendant, by his counsel, objected, and the court sustained his objection; and this ruling constitutes the subject of the first exception.

In our opinion, this decision of the court was correct. The property which was the subject of this suit was situated in Washington, and was quite distinct from the personal prop-

erty in Brooklyn. But the bill of sale so offered in evidence expressly declared that the property thereby conveyed was the same property which was conveyed, sold and transferred by Evans to Stratton by bill of sale of the 8th of December, 1873, "and which will more fully appear by the schedule annexed to the bill of sale made by said Evans, and which is made part of this bill of sale." This bill of sale of the 8th of December, and the annexed schedule, comprehended only the Brooklyn property, and had no reference whatever to the personal property in Washington city. It was, therefore, irrelevant to the issue before the jury, since it could not conduce to prove that Stratton had conveyed the Washington property to Langdon. The construction of the paper was, of course, for the court; and we think no other interpretation could be given to it than that it related solely to the property in Brooklyn. It was insisted, however, that the plaintiff should have been allowed, as his counsel asserted he could have done, to introduce testimony to show that it was designed by the parties that the bill of sale of December 29th should also convey the Washington property; and the propriety of the admission of such parole evidence was claimed upon the ground that a latent ambiguity existed in the paper which could thus be made the subject of explanation. Even if this offer had been made at the trial below, which was not the case, we cannot see that the court could possibly have held that any latent ambiguity, authorizing such explanation, existed. The trouble with the plaintiff's case was that the paper was too free from ambiguity; for the reference to the property designed to be passed was so plain as not to admit of question. It was the Brooklyn property, and none other. An offer, then, to show that the Washington property had been referred to in the bill of sale, instead of the Brooklyn property, or that it should also have been included along with the other, would have been inadmissible under the plainest principles of law. The case is exactly within the decision of this court, in the case of *Patch vs. White*, 1 Mackey, 468, where we refused to allow the plaintiff in ejectment to introduce testimony to

show that a devise of "lot No. 6 in square 403," should be read as a devise of "lot No. 3 in square 406."

But the rejection of this evidence, even if erroneous, became immaterial in the further progress of the case, as the bill of sale objected to was subsequently read in evidence without objection.

2d exception. The plaintiff then offered evidence tending to prove that, about the 30th of December, 1873, Stratton, being then in actual possession of all the property so conveyed to him by Evans, delivered to the plaintiff an inventory of the tools and materials of the Evans Concrete Co., on Seventeenth street, in the city of Washington, and at the same time gave him manual possession of said goods and chattels. After the witness had been turned over to the defendant for cross-examination, the plaintiff offered in evidence, during the cross-examination of the witness (who was the plaintiff Langdon), as an estoppel, an exemplified copy of a record of the Supreme Court of New York for the county of Kings, in a cause there tried and determined, in which the plaintiff in this suit was plaintiff, and the defendant in this suit was defendant. This record consisted of a complaint filed by Langdon against Evans, in which he claimed to recover possession of a quantity of personal property, consisting of engines, wagons, materials, &c., about the yard at the corner of Fourth avenue and Water street, in the city of Brooklyn; and of three pleas interposed by the defendant, Evans, asserting property in the goods on his part. Then followed the entry of a verdict of the jury for \$6,000 in favor of Langdon, and of the judgment that the plaintiff retain possession of the property, and recover his costs of suit. "To the introduction in evidence of the said exemplified copy of the said record, the defendant, by his counsel, objected, on the ground that it was not an estoppel, and *on the ground of the time at which it was offered*;" and the court sustained his said objection, and would not permit the said record to be read or given in evidence. And this constitutes the second exception.

Apart from every other objection, the judge was right in

refusing to allow the cross-examination to be broken in upon by this new matter, offered out of season by the plaintiff. But if his action was of questionable propriety, it is well settled that all rulings as to the order in which evidence shall be offered during the trial, are within the discretion of the presiding judge, and are not the subject of appeal. If authority were needed for this reasonable proposition, it may be found in *Bannon vs. Warfield*, 42 Maryland, p. 26.

3d exception. When the plaintiff resumed his testimony, he offered, as part of his evidence in chief, testimony to prove that on December 30, 1873, he went into possession of the property in Washington, mentioned in the schedule, and remained in actual possession until the 5th day of February, 1874, when it was forcibly taken out of his possession by the defendant. And the plaintiff again offered the bill of sale of December 29, 1873, which was admitted by the court and read to the jury; and he then again offered in evidence the said record of the Supreme Court of King's county; "and in connection therewith, he offered as matter of estoppel upon defendant, to show by parol proof that the issues in that case were identically the same as the issues in this case, that the validity of the title derived by Langdon from Evans, which is in issue in this case, was at issue in that case, and that the verdict and judgment in that case was between the same parties that are plaintiff and defendant in this case; that the subject-matter and evidence in that case were the same as in this case; and that all the paper writings offered and proved in this case, excepting the judgment record, were offered, proved, and read in evidence in that cause."

"To the introduction of evidence of the last named record, and of the said parol proof in connection therewith, as matter of estoppel, the defendant, by his counsel, objected; and the court sustained his objection, and would not permit the said record to be read, or the said parol proof to be given in evidence, to the jury."

This exception involves the examination of the principles governing the introduction of a judgment record as an

estoppel, or as conclusive evidence in a case. It is well settled that it is not essential that an estoppel should be specially pleaded. The judgment may be offered in evidence equally under the general issue. But it is also well settled that if the record of the judgment so offered does not, on its face, demonstrate the identity of the parties of the subject-matter, and of the pleadings, it is requisite, before it can be admitted as evidence, to establish that identity by extrinsic proof. And it has been equally well determined, that if the plaintiff offers such evidence, it is competent for the defendant to adduce evidence in reply. The law of this subject is very clearly expounded in the case of *Sickles vs. Packet Co.*, 5 Wallace, 580. The plaintiff, the patentee of the Sickles Cut-off, sued the defendant in the Supreme Court of this District to recover for the use of the invention on its steamboats, for a designated period. The declaration averred that the parties had made a contract by which the company agreed to pay the patentee for the privilege, a certain proportion of the saving of fuel resulting from its use; the amount of this saving to be ascertained by the steamboat company feeding the engines from two equal piles of wood, one to be used with, and the other without, the cut-off. The defendant pleaded the general issue. On the trial, the plaintiff, without otherwise proving the contract declared on, offered to read in evidence the record of a previous recovery in the same court in an action brought by the same plaintiff against the company, for the use of the cut-off for a period preceding that comprehended in the pending suit. The declaration in the suit thus offered in evidence contained four counts. The first described the contract precisely in the language of the declaration in the pending suit; the second and third were the money counts for a *quantum valebat*, and the fourth was a special count alleging a similar contract, but not describing the mode in which the saving was to be ascertained. The verdict in that first action was rendered generally in favor of the plaintiff; but subsequently the judgment was entered upon the first count only of the declaration. The trial court admitted this

record of the former recovery, without any extrinsic evidence in its aid or explanation, and refused to allow the defendant to offer proof disputing the existence of the contract, or disproving any of the other averments in the declaration.

The Supreme Court of the United States held, on appeal (24 Howard, 334), that this ruling was erroneous; that the record was properly admitted as evidence of the former trial between the parties; but as the pleadings, verdict and judgment did not of themselves furnish the necessary proof that the contract in controversy in the case then on trial was the same that had been litigated in the former suit, extrinsic evidence was requisite on the part of the plaintiff to establish the identity of the controversy; and that notwithstanding his omission to adduce it, the defendant had the right to offer the proof which was ruled out by the court. The case was accordingly remanded to the Supreme Court of the District of Columbia. At the retrial, the plaintiff again introduced the record of the former recovery, and in support thereof offered the testimony of jurors who were impanelled in the cause described in that record, to show what was the evidence given at that trial, to prove that the contract described in the declaration in the pending case had been in controversy in the prior suit, and had there been conclusively adjudicated in his favor. Thereupon, when the plaintiff rested, the defendants offered to prove that the only contract given in evidence on the former trial was verbal, their avowed purpose being to avail themselves of the provision in the Statute of Frauds, that no suit shall be brought to charge any person upon any agreement, not to be performed in one year, in the absence of some memorandum or note in writing. The evidence thus offered was excluded by the trial court, and the propriety of this ruling was brought before the Supreme Court by a second appeal, which is reported in the case cited from 5th Wallace. In this last case the judgment of the court below was again reversed, the Supreme Court holding that it was competent for the defendant to offer the excluded testimony as rebutting evidence, to disprove the plaintiff's allegation as to the identity of the

subject involved in the two suits. The court says: "But this extrinsic evidence (offered by the plaintiff) was open to be controverted on the part of the defendants. As the record itself did not furnish evidence of the finding of the existence or validity of the contract in the former suit, and hence extrinsic proof was required to this effect, it was of course competent for the defendants to deny and disprove both, as in so doing they did not impeach the record, but only sought to disprove the evidence introduced by the plaintiffs. The rejection of this evidence, therefore, offered by the defendants on the trial, was error."

The court further says: "As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined; that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde*, consistent with the record, may be received to prove the fact; but, even when it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be included."

It appears in the case before us, that the record, with the accompanying offer of evidence, was presented as part of the plaintiff's case in chief before the defendant had entered upon his case or had indicated what his line of defence would be otherwise than by his plea of the general issue. The offer, therefore, to show that the evidence in the King's county case was identical with that in the present proceeding, was purely conjectural; for it was impossible for him at that

stage of the case to predict what the defendant would offer to prove; and if the record had been received when it was offered, as an estoppel, the case would thereby instantly have been settled against the defendant, and he would have been prevented from adducing a word of evidence to meet the parol proof of the plaintiff. *Non constat* that the evidence which the defendant was then prepared to offer might not have been essentially different from that presented in the Brooklyn case. For he might have denied the execution of the agreement, or of the bills of sale, or might have insisted that the property sought to be recovered in the present suit was no part of that which had been originally sold by Evans to Stratton. And whether these defences or others were to be interposed could only be ascertained by allowing the defendant to proceed with his evidence. Besides, it is manifest that the title to the Washington property could not properly have been in issue in the Brooklyn case, for by the original agreement, the contracts as to the Washington and the Brooklyn property were entirely independent of each other. The price of the Washington property is specified in the agreement as \$131,000, and that property was to be paid for by five pieces of land amounting, together, to 810 acres; whereas, the Brooklyn property was valued at half that sum, and was to be paid for in a different parcel of land containing 723 acres. It was quite possible, therefore, that the consideration for one of these purchases might fail, while that for the other might be maintained. It was not a case where the several portions of a property sold are parts of a whole which must be used together, although separate valuations of the portions may be mentioned in the contract of sale merely for convenience; as, for example, where a ship is sold for a gross sum, and the hold is valued as representing a certain part of the amount, and the rigging another. But here the two sales were independent and distinct; and the failure of consideration as to the Brooklyn property would not necessarily imply a similar failure with respect to the property in Washington. We think the court was certainly right in

refusing to admit the record as an estoppel at the time and in the manner in which it was offered.

If, however, the record had been offered as evidence, and the plaintiff at the proper stage of the case, had adduced parol proof to show what was in issue in the Brooklyn case, and it had appeared, after the defendant had offered his evidence in rebuttal, that the issues and evidence were the same in the two cases, such a judgment would have operated conclusively in favor of the plaintiff. But this course was not pursued.

It is moreover admitted at bar by the counsel, that the Brooklyn judgment has since been reversed; so that if this court were to hold that the record had been improperly excluded below, our ruling could be of no benefit to the plaintiff, since it would not now be possible for him to offer the record of the reversed judgment in evidence for any purpose, on a new trial.

4th exception. After the plaintiff had rested, the defendant, Evans, testified that Stratton had made material false representations as to the Berkshire lands which formed the consideration of the bills of sale executed by him, to Stratton, of the personalty in Brooklyn and Washington, and of the unexecuted paving contracts in those cities; that he relied upon those representations when the bargain was made, and that he did not discover their falsity until the latter part of January, 1874, after the lands had been conveyed by Stratton to the wife of the defendant; that he had never accepted those deeds of the lands, and as soon as he discovered the falsity of these representations he had rescinded the bargain and had resumed possession of the Brooklyn and Washington properties, and had re-entered upon the completion of the unfinished contracts. The bill of exceptions then says, "and it becoming important and material to prove whether the said defendant had not, after discovering the character of said representations, used the said lands so deeded to his wife, to qualify her to become a surety possessing real estate of the value of \$200,000, on the 5th of February, 1874, on certain bonds for \$185,000, to be

given to the Board of Public Works of the District of Columbia, the defendant was asked on the cross-examination by the plaintiff's counsel, whether he did not so use said lands at the time, in the manner, and for the purpose stated; and he having in answer thereto testified on cross-examination that he did not so use said lands, he was then further asked by the plaintiff's counsel the following question:

"Q. Were you examined as a witness on this subject in the Congressional investigation, on the 18th of April, 1874?"

The court thereupon suggested that, instead of going into the matter of that investigation, the counsel should produce the bonds on which it was said Mrs. Evans had been taken as surety, which the plaintiff's counsel stated he was not then prepared to do. The exception then shows the following colloquy:

"Mr. WELLS: I ask this witness whether he did not, on the 18th day of April, 1874, testify before the Congressional committee in relation to this very subject, that he had repeated notices from the board to come forward and sign the contracts and the bonds, and that he informed the attorney of the board—

"Mr. VALENTINE: I object.

"Mr. WELLS stated that he proposed to read from page 1237 of the printed record of the Congressional investigation as to what was then said by the witness on the subject.

"Objection sustained. Exception reserved by Mr. Wells."

As well as we can understand the point designed to be presented here, we think the exception is not maintainable. The witness Evans, after he had testified that he had repudiated the agreement with Stratton, and refused to acknowledge the validity of the transfer of these lands as early as January, 1874, was asked whether he had not, in the following month, offered to pledge those very lands standing in his wife's name, by the bonds referred to.

We think this was a proper question on cross-examination, it not referring to matters that could properly be considered collateral; therefore it was competent for the plaintiff to

prove directly that the defendant had in fact pledged the lands in February, 1874, notwithstanding his denial. The court's suggestion that the plaintiff produce the bonds themselves, was an intimation that such evidence would be received. The credibility of the defendant as a witness was also open to impeachment by proof that he had made a statement at variance with his present denial, before the Congressional committee on a designated day. But this inquiry was not properly addressed to the truth or falsity of the principal subject of inquiry, but could only be admissible upon the question of his credibility as a witness. To this question the witness replied in the negative. The plaintiff then had a right to show, by competent testimony, for the purpose of such impeachment, that the defendant had made a different statement; but the offer to read, for that purpose, the alleged testimony from a page in an unauthenticated book styled a Congressional investigation, was properly excluded.

The exception then proceeds:

"Whereupon the plaintiff, by his counsel, asked the witness whether he did not, on the 18th day of April, 1874, testify before the Congressional committee in relation to this very subject, that he had repeated notices from the board to come forward and sign the contracts and the bonds, and informed the attorney for the board, as is stated on page 1237 of the printed record of the "Congressional investigation," which the plaintiff thereupon offered to read, and which was and is as follows:

And the exception then sets forth nearly three pages of printed matter, said to be copied from the alleged "Congressional investigation," and then proceeds: "To which last question and offer the defendant, by his counsel, objected; which objection the court sustained, and would not allow the said question to be asked, or the said testimony given by the defendant before the said Congressional investigation to be read."

We think this ruling was correct upon several grounds. The transactions referred to in the pages thus taken from

the "Congressional investigation" do not tend to disprove the statement of the defendant. They refer to transactions which were said to have occurred in October or November, 1873.

If it be proved that Evans had, in the fall of 1873, offered his wife as a surety upon the bonds referred to one or two months before the agreement for the purchase of the lands had been made, and, of course, before Evans or his wife had any right to pledge them, it would not have tended to prove that he had offered them as security on the 5th of February, 1874, which was the date mentioned in the question propounded to the defendant and by him answered in the negative. Such evidence, therefore, could not have been admissible to contradict Evans as to the alleged occurrence in February following.

Again, there is nothing in the extracted testimony which even tends to show that the property, which it is averred Mrs. Evans was willing to pledge in the fall of 1873, was the property in Berkshire county, Massachusetts. For aught that appears in that extract, the land may have been situated in Ohio or Louisiana. The innate improbability of the idea that Evans had offered to pledge the Berkshire land in February, 1874, to secure his paving contracts in Washington city, is made apparent, when it is considered that in December, 1873, Evans had turned over to Stratton all these contracts, and had washed his hands of all further connection with them, and that it was not until he repudiated the agreement, in January, 1874, that he resumed control of those contracts. It surely would have been a most extraordinary act on the part of this man, whose resumption of the Washington contract was predicated solely of his having repudiated the bargain as to the Berkshire lands to claim ownership over them anew a month afterwards, and offer to pledge them as a means of carrying on the contract which he had only resumed because of his refusal to have anything further to do with the Berkshire property in any manner, shape or form.

5th exception. The defendant then offered and proposed

to examine Theodore A. Stratton, who was sworn as a witness. The plaintiff objected to his examination, on the ground that he had been previously convicted of a felony, and had served out a sentence in the penitentiary; and he offered in evidence a record of Stratton's conviction, in a court of New York city, for an attempt to induce another to commit perjury. The court overruled the objection, and held that the witness was competent to testify.

We think this ruling also was correct. The conviction took place in the State of New York, which, *quoad hoc*, is to be considered as a foreign jurisdiction with respect to this District. In 1st Greenleaf's Evidence, § 376, the author concludes his examination of the question, which he admits has been the subject of disagreement in the courts, in these words: "But the weight of modern opinions seems to be that personal disqualifications, not arising from the law of nature, but from the positive law of the country, and especially such as are of a final nature, are strictly territorial, and cannot be enforced in any country other than that in which they originated. Accordingly, it has been held, upon great consideration, that a conviction and sentence for a felony in one of the United States did not render the party incompetent as a witness in the courts of another State; though it might be shown in diminution of the credit due to his testimony."

Whether the offence charged in the record of conviction was a felony in New York city, does not appear, but we see no reason to doubt that the same rule would apply if it were only a misdemeanor. There was read at bar a public statute of the State of New York, which declares that a person convicted of a crime or misdemeanor in that State is, notwithstanding, a competent witness in a civil or criminal action or civil proceeding depending in its courts. It would be a questionable exercise of judicial power for a court of this District to hold a person incompetent to testify because of his conviction in a jurisdiction where that conviction would not be held to disqualify him as a witness. Other reasons were assigned why the witness should not have been held

competent, as that he had served out his term, and that an ancient statute of Maryland, in force at the cession of this District, would have justified his examination; but it is unnecessary to pursue the inquiry, as we think the witness was clearly competent for the reason first assigned.

6th exception. After the evidence was closed, the court granted ten prayers offered by the plaintiff, and a large number offered by the defendant; and thereupon, of its own motion, gave the charge which is set out in the record. This exception states that the plaintiff excepted to each of the prayers granted on the application of the defendant, "and to so much of the said instructions, granted by the court on its own motion, as are contained in brackets."

We see no error in the instructions excepted to. Such of them as presented any question open to question, have been practically settled in what we have already said.

With respect to the exception taken to two printed pages of the charge "contained in brackets," we remark, that it has been repeatedly announced by the courts of highest resort in this country, and notably by the Supreme Court of the United States, that an exception conceived in such language as this, does not properly present to the appellate court any question which it is called upon to examine and decide. It is well settled, says the Supreme Court in *Rodgers vs. The Marshal*, 1 Wallace, 644, that if a series of propositions be embodied in instructions, and the instructions are excepted to in mass, if any one of the propositions be correct, the exceptions must be overruled. Again, in *Beaver vs. Taylor*, 3 Otto, p. 55, the same court says: "It is not the duty of a judge at the circuit court, or of an appellate court, to analyze and compare the requests and the charge to discover what are the portions thus excepted to. One object of an exception is to call the attention of the circuit judge to the precise point as to which it is supposed he has erred, that he may then and there consider it and give new and different instructions to the jury, if in his judgment it should be proper to do so. And in *Railroad Company vs. Varnell*, 8 Otto, 484, the court says: "Neither the

exception nor the assignment of error designates any particular remark of the judge as erroneous; and in view of the fact that the exception is addressed to the entire remarks as an instruction, the court is of the opinion that it requires no further examination." Exceptions of this kind are not entitled to favor. Nothing could be more unjust to the judge presiding below than to interpose such a wholesale objection without pointing out any particular remark as incorrect, and then take the risk of inducing the appellate court to range through the whole charge and find some specific objection where the counsel was not able to do so at the proper time. We would not be justified, therefore, in the face of reason and of these rulings, in reversing upon this drag-net exception, even if we found some errors within the metes and bounds, courses and distances platted on the record. But a careful examination of half of the charge thus indicated satisfies us that the greater part of it consists of propositions of law that cannot be disputed, and were not disputed in the argument here, and that the few sentences complained of are not obnoxious to the criticism of the plaintiff.

This is the second time this case has been before a jury, and a verdict has now been rendered which it is to be hoped will put an end to the further litigation of this subject; and we are not disposed to strain a point to enable one of these parties to compel the other to embark in further strife.

The judgment below is affirmed.

KEYSER vs. BREITBARTH.

Appeal from Probate Court.

{ Decided November 26, 1883.
{ The CHIEF JUSTICE and Justice JAMES sitting.

If an administrator pays a claim of a creditor of his decedent's estate, and returns it in his account, the Orphans' Court may allow it or reject it; but if the administrator refuses to pay such a claim, the Orphans' Court has no authority to adjudicate it; the creditor must seek its enforcement against the administrator in another tribunal.

THE CASE is stated in the opinion.

ELLIOT & ROBINSON for plaintiff.

N. H. MILLER for defendant.

Mr. Justice JAMES delivered the opinion of the court.

In this case, which was heard by the Chief Justice and myself, it appears that Bernard Henze was the owner of two restaurants, one on Pennsylvania avenue and the other on Seventh street, the latter occupying a building belonging to the German American National Bank, of which the petitioner, Keyser, was appointed receiver. Henze had taken from Keyser a lease for the term of five years. The rents were paid, according to an account shown in the proceedings in the Orphans' Court, down to the last month of Henze's life. He died on the 7th of December, 1879, and the last month's rent unpaid accrued on the 5th of the month. Mrs. Henze was appointed executrix of her husband's will, but a caveat was entered, and in the meantime she received letters *ad colligendum*. She acted under these, and took possession of the furniture in the house of the decedent, and of everything in the two restaurants. It appears by the proceedings in the Orphans' Court, that by consent of all the parties then interested, she proceeded to carry on the two restaurants, making expenditures and collecting the assets of the estate. She rendered her account, showing the estate to be indebted to her \$498.67. January 16, 1880, the caveat was withdrawn, and a few days afterwards Mrs. Henze renounced as executrix, whereupon

George Breitbarth, a creditor of the estate, was appointed administrator, and, under an order of the court, sold the personal effects of the decedent, including the furniture and fixtures of the restaurant. Keyser proceeded to present his claim against the estate in the Orphans' Court, claiming that he had a lien on the chattels that were in the restaurant for all the rent accruing, not only during the lifetime of the decedent, but during the occupation of the premises by the widow. He made a bill of something over five hundred dollars, and claimed that it was a lien upon the proceeds of the sale.

When Breitbarth presented his final account, it appeared that he had credited Mrs. Henze with the sum of \$498.67, as money advanced by her to the estate. Keyser filed exceptions to the account of Breitbarth, especially as to this item; but the Orphans' Court overruled the exceptions and passed the account, and Keyser now appeals from that order. His exception is, that his claim for rent attached as a lien upon the fund in the hands of the administrator arising from the sale of the furniture of the restaurant, and that it should have been first satisfied.

We do not think that the Orphans' Court has any authority to adjudicate this claim. If an administrator pays a claim against his decedent's estate, and returns it in his account, the Orphans' Court may allow it or reject it; but if he refuses to pay, the creditor must establish and enforce his claim in another tribunal. As to this repayment to Mrs. Henze of money which she appears to have advanced the estate, without going into the facts of the case, we think that the action of the Orphans' Court was correct in allowing it in the administrator's account. And we, therefore, affirm the order of the court. This does not all interfere with Keyser's remedy, whatever he may have, as a creditor of the estate.

CHARLES W. HOFFMAN *vs.* EDWIN R. HAIGHT.

LAW. No. 23,529.

{ Decided December 3, 1883.
{ The CHIEF JUSTICE and JUSTICES COX and JAMES sitting.

Although the creditor's name be innocently or accidentally (but not fraudulently) omitted from the schedule of creditors provided for by the Bankrupt act of March 2, 1867, the discharge and certificate is conclusive evidence in favor of the bankrupt, and a complete bar to a suit against him by the omitted creditor.

THE CASE is stated in the opinion.

GEO. E. HAMILTON for plaintiff.

J. S. BROWN for defendant.

Mr. Justice COX delivered the opinion of the court.

The plaintiff sued on a promissory note for the sum of three thousand dollars, to recover an alleged balance of \$1,913.15, unpaid, with interest at ten per cent. per annum from February 24th, 1879. The defendant pleaded a discharge in bankruptcy, and the plaintiff replied "that the indebtedness sued on was not named or contained in the defendant's statement or schedule of debts filed with his petition in bankruptcy, and that no notice whatever of the filing of said petition, or of the subsequent proceedings thereon, was served on this plaintiff, either by mail or personally; and that this plaintiff did not, in fact, have notice thereof until the filing herein of the defendant's plea."

To this replication the defendant demurred, on the grounds: First. That the notice required by law of the bankruptcy of a debtor is by letter sent to each creditor by mail, personal service, and by publication; Second. That when a bankrupt, without fraud, files a list of his creditors, with the names, places of residence, and amount due each, and appends an oath that it is a true schedule of his creditors and debts, it is conclusive upon all his creditors; and, Third. That creditors not named in that schedule are presumed to be notified by the publication.

The question really intended to be met by this demurrer,

although it is not presented in as condensed a form as it might be, but was made in argument, is, whether the omission of a creditor's name in the schedule, innocently or accidentally, but not fraudulently, makes the discharge a nullity towards that creditor. I may notice, very briefly, two or three provisions of the bankrupt act. Section eleven of the act of March 2, 1867, says, that "the said schedule must contain a full and true statement of all his debts, exhibiting, as far as possible, to whom each debt is due, the place of residence of each creditor, if known to the debtor, and, if not known, the fact that it is not known; also the sum due to each creditor; the nature of each debt or demand," &c. And the same section further provides that, "upon the filing of such petition, schedule and inventory, the judge or register shall forthwith, if he is satisfied that the debts due from the petitioner exceed three hundred dollars, issue a warrant to be signed by such judge or register, directed to the marshal of said district, authorizing him forthwith, as messenger, to publish notices in such newspapers as the warrant specifies; to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him, in addition, by the debtor, and to give such personal or other notice to any persons concerned, as the warrant specifies."

Then, every bankrupt is to be "at liberty, from time to time, upon oath, to amend and correct his schedule of creditors and property, so that the same shall conform to the facts."

Sections 32 and 33 provide, that if it shall appear to the court "that the bankrupt has in all things conformed to his duty under this act, and that he is entitled under the provisions thereof to receive a discharge," the court will grant him free discharge from all his debts, except in case of fraud.

Section 34 provides that "a discharge duly granted under this act shall, with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities and demands, which were or might have been proved against his estate in bankruptcy," &c.

A discharge, *duly granted*, is to have this effect. It is admitted that the claim in the present case could have been proved against the estate in bankruptcy, so that if the certificate is duly granted, it is a discharge from that debt.

It is claimed, however, that if any creditor's name is omitted from the schedule, the discharge is not duly granted, as to him. Now, that depends upon the question whether the bankrupt, in such a case, has conformed to his duty under the act. If he has fraudulently omitted the names of any creditors in the schedule, he has not conformed to his duty, and is not entitled to receive a certificate of discharge, and perhaps in that case the discharge may be said not to be duly granted. Another question may arise here which it is unnecessary to more than allude to, and that is, whether that creditor is not confined to proceedings in the bankrupt court, because in section 34 it is provided, that "the certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge; always provided, that any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge, on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it, to set aside and annul the same."

Passing by that question, however, we come to the question whether the bankrupt may be said to have conformed to his duty under the act, if he innocently or accidentally omits the name of any creditor on the schedule. Now, according to the weight of authority, we are satisfied that the accidental and innocent omission of the creditor's name from the schedule does not affect the regularity of the proceedings. It is not a breach of the bankrupt's duty so as to affect the question whether his discharge is duly granted or not. The authorities say that the act does not contemplate an absolutely accurate schedule of creditors, because it directs the marshal to send notices to those who are named in the schedule, *and to such others as may be afterwards fur-*

nished to him, and also provides for amendments to the schedule; from time to time, under oath, by the debtor, all of which assumes that the regular schedule may not be altogether accurate. And they say that if the debtor has furnished a list which is accurate to the best of his knowledge and belief, it is in substance a conformity to his duty as prescribed by the statute, and it does not affect the regularity of the discharge.

It is contended, however, that in the case of voluntary bankruptcy the nature of the proceeding is that of an action brought by the debtor against his creditors, in which he is seeking a judgment of discharge in bankruptcy; and, upon general principles, it is said that a court has no jurisdiction to pronounce a judgment against any person who is not made a party to the proceeding by personal service of process in the shape of summons, or other process. There is a great deal of plausibility in the suggestion, and it is supported also by several cases which have been cited; but they are not decisions in any court of last resort.

There is another view, however, which may be urged with equal plausibility. The bankrupt law is established by Congress. The object of all bankrupt legislation is two-fold; one object being to appropriate the assets of the debtor to the satisfaction of his debts, as far as they will go, and the other to discharge the debtor from any further liability for his existing debts; and these two things are not necessarily dependent upon each other. Congress, if they see fit, may make the discharge of the debtor to depend on his activity in giving notice to his creditors, and seeing that all his assets are applied to their claims; and, on the other hand, Congress may provide (because there is no particular form in which these bankrupt laws shall be constitutionally made), that the debtor shall be absolutely discharged at the moment when he surrenders his property, and the law may take upon itself the duty of notifying his creditors and distributing his assets. And, in truth, though this is, in a certain sense, a proceeding *inter partes*, it is also

a proceeding *in rem*. With reference to the assets, it is clearly *in rem*. And with reference to the other proceeding, its object is to determine the status of the debtor. In the first place, the court declares that the debtor is a bankrupt, and is no longer capable of managing his property, and it shall be taken away from him, and then, discharging him, says, that as to these debts, he is a free man henceforth, capable of contracting new debts and acquiring other property without being liable for his previous debts. And upon analogy, the jurisdiction of the court in such a case may exist without the presence, actual or constructive, in the court of any adversary party. Just as in a case in admiralty, or in cases in the probate court respecting testamentary capacity, or divorce cases, it would be competent for Congress to provide that a publication shall give full jurisdiction to a court to determine questions of personal status; in other words to proceed *in rem*; and that decision would be conclusive against all the world.

Although this view is not very well formulated in authorities, we find that, according to the weight of authority, the presence of the creditor in the bankrupt court is not essential to its jurisdiction, but that jurisdiction is obtained by the petition and publication. Several cases were cited, in which the court very emphatically held (the courts of Iowa and Massachusetts), under substantially the same provisions as are contained in the last bankrupt act, that the omission, accidentally or innocently, of the creditor's name did not affect the validity of a discharge. In the notes to Bump's Law and Practice of Bankruptcy there is quite a large collection of authorities to the same effect, which it is not necessary to go into in detail. One is the case of *Hubbell vs. Cramp*, 11 Paige Chancery Reports, 310, where Walworth, chancellor, says:

"The statute does not require absolute certainty in the petition, either as to the list of creditors or as to the inventory of the property of the bankrupt. But it requires that the bankrupt shall set forth both, according to the best of his knowledge and belief.

And as the presenting such a petition is necessary to give the court jurisdiction in the case, if it can afterwards be shown that the bankrupt intentionally or knowingly omitted the names of any of his creditors, or wilfully misstated the places of their residence, or the amount of their debts, I am not prepared to say that the discharge cannot be avoided on that account; although that may not be one of the frauds referred to in the fourth section of the bankrupt act, for which the discharge may be impeached.

"The answer in the present suit, however, shows the necessary facts to give the district court of the northern district of New York, jurisdiction of the case. For it states, among other things, that the defendant, Cramp, presented a petition to that court, in March, 1842, such petition setting forth, *to the best of his knowledge and belief*, a list of his creditors, their respective places of residence and the amount due to each, together with an accurate inventory of his property, &c., verified by his oath. And the fact that the names of the complainants who held a note upon which Cramp was only second endorser, were not inserted in the list of creditors, is not sufficient to induce a belief that his petition was false, as not containing a correct list of his creditors, according to the best of his knowledge and belief. The jurisdictional facts, being thus stated in the answer and sworn to, must be taken as true for the purposes of this application. That being the case, the act makes the discharge and certificate conclusive evidence in favor of the bankrupt, and a full and complete bar to all suits against him, unless the same is impeached for some fraud, or wilful concealment of his property or rights of property."

It is unnecessary to pursue the cases in detail. The weight of authority is decidedly in this direction, and we, therefore, sustain the demurrer to the plaintiff's replication.

SARAH MORROW vs. HENRY B. JAMES ET AL.

EQUITY. No. 7758.

{ Decided December 10, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and Cox sitting.

A payment by a stockholder of a building association, of his dues to one of its officers not having authority to receive them does not discharge the stockholder if the officer so receiving the money fails to pay it over; nor can the association charge the loss against its assets in its account with the stockholders so as to diminish the value of their shares.

THE CASE is stated in the opinion.

WM. HENRY BROWNE, for plaintiff, cited the following authorities:

Bray vs. Farwell, 81 N. Y., 608; Bowman vs. Close, 44 Iowa, 428; Burnes vs. Pennell, 2 H. L. C., 521; Logan vs. McNaugher, 88 Pa., 103; *Ex parte* Lawes, De G. M. & G., 421; Burnside vs. Dogrell, 3 Ex., 224; Rennie vs. Wynn, 4 Ex., 691; Chapler vs. Brunswick Building Society, VI L. R., Q. B. Div., 710; Conway vs. Log Cabin Building Ass., 52 Md., 136; Bramah vs. Roberts, Bingham's New Cases (1836-7); Wyman vs. Hollowell Bank, 14 Mass., 58; Fay vs. Noble, 12 Cush., 17; *In re* County Life Assurance Co., L. R., 5 Ch., 288; 39 L. J. Ch., 471.

ELLIOT & ROBINSON, for defendant, cited:

Endlich on Building Ass., § 104; *Ibid.*, §§ 517, 519; McGrath vs. Hamilton Building Ass., 44 Penn. St., 383.

Mr. Justice Cox delivered the opinion of the court.

The case of Morrow vs. James and others, is an action brought by one stockholder in the Territorial Savings, Loan and Building Association of the District of Columbia, against the officers, in their character of officers, and as representatives of the other stockholders of the same association. The case made by the bill is, that the treasurer of the association is the officer designated to receive payment of all the dues which the members have to contribute monthly, article six of the Constitution providing that, "Each stockholder, or trustee, for each and every share of

stock held by him in this association, shall pay into the treasury, in lawful money, at each and every stated meeting of this association on the second Friday of each month, the sum of one dollar;" and it is made the duty elsewhere of the treasurer to receive all moneys so paid in; that the complainant, as a stockholder of the association, regularly paid in her dues every month; that quite a number of the members of the association, instead of paying into the treasury, entrusted their dues to the secretary of the association, a man named Seth A. Terry, to pay in on their account, and that Terry, instead of paying the money into the treasury, appropriated it to his own use; that in the settlement and winding up of the association, the officers proposed to charge this loss to the association and deduct it from the assets of the association, so that the distributive shares of the several members should be thereby reduced, including that of the complainant; whereas she maintains that this was not a loss by the association, but a loss of the individual members who paid their dues to the wrong person, who had no authority to receive them, and that the dues are to be considered as not having been yet paid by those members—not lost by the association, but still a part of their assets, and to be charged against the members by whom they were payable, and that they ought not to be charged as a loss against the shares of this complainant in the assets of the concern. That is really the only question presented in the case.

The answer does not deny any of the substantial averments of the bill, but it avers certain propositions which are really conclusions of law. They aver the fact to be, "that by reason of the heavy defalcation of the secretary of the association (Terry), the assets of the association were so reduced that it became impracticable to divide among the shareholders more than forty per cent. of the value of their stock as it existed prior to the said defalcation; that said Terry was a member of said association and partner therein, and the complainant and all other shareholders or partners were equally bound to contribute to any losses sustained

by the partnership by reason of the defalcation aforesaid."

And they repeat that in the language following:

"That the money paid by the members or partners who did pay to the said Terry, was paid by them to an officer of the association . . . and a partner therein, and these defendants are advised, and accordingly aver, that in so far as money was paid to him in that capacity, they were paid to the association."

Then they further aver, that an amendment was made to the constitution, in the following terms:

"For the purpose of ascertaining the amount due on withdrawal, the board of directors shall, at a regular meeting, once in three months, report the value of each share of stock as shown by the assets and liabilities of the association."

The answer seems to rely, first, upon this amendment. But we are unable to perceive how that amendment affects the case, or how it advances us one step towards the solution of the question which is really involved. The amendment directs that the assets shall be ascertained periodically; but what the assets are, is the very question, and whether this loss is to be deducted from the assets as a loss of the association. So that we are only brought back by this amendment to the question stated in the outset, as the question involved in the case.

Then the answer seems to rely on the general law regulating the relations of partners or third persons. It is undoubtedly true that ordinarily a person dealing with a partner may pay money to any member of the concern, because, presumptively, each member is agent of the others. He may make contracts and give receipts and acquittances in the name of the firm, and they will bind the firm. But this presumption is rebutted, if it appears by the articles of copartnership that one or more members of the firm are the only persons designated to make contracts and give acquittances, and that is known to the party dealing with the firm. Still less would that apply to the case of a joint stock association like this, where the membership is large, and where each member is not presumed to be authorized to act

for the whole concern, but the business of the concern is to be transacted by officers elected for that very purpose.

Now, it seems to us very plain, that if one of these stockholders had paid his dues to another stockholder, who did not happen to be an officer, for the purpose of having it paid into the association, and that stockholder so receiving the money had become a defaulter, such payment would not have been by any means a discharge for the first stockholder, for it would not have been, in construction of law, received by the association. Can it make any difference that the other stockholder happens to be an officer who is not charged with the duty, or clothed with the authority to receive the money? It does not seem so to us. We have not had a single authority cited in favor of such a proposition. On the contrary, the whole tenor of the authorities seems to be in the other direction. We need not refer to more than one or two. Thus, in *Burnes vs. Pennell*, 2 H. L. C., 521, Lord Campbell says, among other things:

"Although a joint stock company is a partnership, it is a partnership of a different description, and attended with different incidents and liabilities from a partnership constituted between a few individuals who carry on business jointly with equal powers and without transferable shares. All who have dealings with a joint stock company know that the authority to manage the business is conferred upon the directors, and that a stockholder, as such, has no power to contract for the company. For that purpose, it is wholly immaterial whether the company is incorporated or unincorporated."

In another case, *Burnside vs. Dogrell*, 3 Ex., 224, it was held that the receipt of deposits by one member of a joint stock company is not equivalent to a receipt of them by the others. Pollock, C. B., said, at *nisi prius*, that "the parties who paid the money must look to those who received it." On review, the same judge said: "No authority can be implied from the mere fact of the party being secretary." Rolfe B. said; "I am entirely of the same opinion." And Platt, B.: "I quite

agree . . . no general authority can be implied from the relationship which existed between the parties."

The third proposition relied on by the answer, is, that the payment by one of the stockholders to any officer of the association, is a discharge to him, and is a payment to the association. But in the light of these authorities, we think that unless it be shown that the officer in question has authority to receive it, it is no payment to the association at all. It seems to us, therefore, very clear on the authorities, and according to the common sense view of the matter, that if these stockholders chose to trust their dues to a man who had no authority to receive them, and he chose to appropriate them to his own use, the stockholder is not discharged, and the association is not charged with the receipt of that money, and therefore the directors in this case had no right to charge that as against the assets of the association, and thereby diminish the share of the complainant in those assets. Therefore, we think she is entitled to relief in the shape of a decree for the amount she claims in which the directors will be enjoined from reducing her share by charging against it a proportion of these lost dues.

THE UNITED STATES, EX REL. THEODORE SCHUMACHER AND
LOUIS EITTLINGER,

vs.

E. M. MARBLE, COMMISSIONER OF PATENTS.

LAW. No. 23,990.

{ Decided December 13, 1883.
{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

1. Whether the act of Congress of June 18, 1874, providing for the registration of labels, is unconstitutional, and, therefore, void, *quære*.
2. A government official cannot call in question the constitutionality of a law directing him to perform a purely ministerial duty.
3. The duty of the Commissioner of Patents, on the application to him to register a label, is a purely ministerial one, as much so as the act of a recorder of deeds in placing upon a public record a muniment of title. The statute has not defined what shall be considered a label, whether it shall be descriptive of the article to which it is affixed, or whether it may be a mere arbitrary design. If the applicant presents it as a label, and appeals to the Commissioner to give it the protection which the law provides for it as a label, the duty of the Commissioner is to register it, and in doing so he gives it only the protection which the statute provides. It is not protected as a trade-mark nor as a copyright. The public at large may use and enjoy it, but *qua* label it is restricted to the use of the party who has registered it for that purpose and no other. With the character of the device the Commissioner is not at all concerned. His function is as purely ministerial as it is capable of being.

STATEMENT OF THE CASE.

Petition praying a mandamus against the Commissioner of Patents.

The petition set forth that the relators being copartners, and the owners and producers of a certain new label designed to be attached to cigar boxes, delivered to the Commissioner of Patents five copies of said label, together with a statement showing that the same was to be used as a label on cigar boxes. Accompanying the label was a description of the same together with fee of six dollars, and a request that said label be registered in the Patent Office, and that a certificate of such registration be issued to the relators: that said proceedings were had under and in compliance with the act of Congress approved June 18, 1874, entitled

“An act to amend the law relating to patents, trade-marks and copyrights;” that the Commissioner received said fee and said labels, statement, description and request, and registered the same under serial No. 14,637, and date June 8, 1882; and that the Commissioner thereupon refused to complete the registry of said label and to furnish a copy of the record, under the seal of the Commissioner of Patents, to the relators, to the great injury of the relators. The petition concluded with a prayer that a peremptory writ of *mandamus* issue against the Commissioner of Patents, requiring him to complete the registry of said label, and to furnish the relators a copy thereof under his seal.

A rule to show cause why such writ should not be granted was issued, and made returnable before the General Term.

WM. HENRY BROWNE for respondent:

1. A *mandamus* cannot issue unless upon respondent's refusal to obey some positive law; and no act of Congress is law unless strictly in accordance with the Constitution.

The petitioners rely on the act of June 18, 1874, entitled “An act to amend the law relating to patents, trade-marks and copyrights.” 18 Statutes at Large, 78; Supplement to Revised Statutes, 41.

That act lacks vitality, unless it springs from one of two clauses in Article I of the Constitution, among the enumerated powers of Congress, to wit, the third clause of section 8:

“To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.”

Or, in the eighth clause of said section:

“To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

2. “Authors.” From the title of the act, we naturally look for authority for its existence in the latter clause of the Constitution.

Are the petitioners “authors?” They do not claim to be, but allege in their petition (p. 1) that they are “the owners

and producers of a certain label." In truth they are not "authors," for, says the United States Supreme Court:

"The writings which are to be protected are the fruits of intellectual labor, embodied in the form of books, prints, engravings and the like." Trade-Mark Cases, 100 U. S., 94.

A mere label, capable of no other use than to be pasted on a bottle or other article for sale, is not the work of an author. *Scoville vs. Toland*, 6 West. L. J., 84; *Coffeen vs. Brunton*, 4 McLean, 516.

3. "Inventors." Are the petitioners "inventors?"

They do not claim to be, for their application for registration is based on the fact of their being "sole proprietors." Besides that, inventors are protected under a different statute, and for a "limited time," and in the act of 1874 the time is not limited.

The Supreme Court said of a trade-mark—a kind of property superior in nature to a label—that it does not "depend upon novelty, upon invention, upon discovery, or upon any work of the brain. It requires no fancy or imagination, no genius, no laborious thought." Trade-Mark Cases, *supra*.

The inevitable conclusion is, therefore, that the eighth clause of section 8 of Article I of the Constitution does not apply to this case.

That is intended only to protect a "right," previously well defined and understood.

4. The commerce clause. Can that apply?

Section 3 of the said act of 1874, says:

"That in the construction of this act, the words "engravings," "cut" and "print" shall be applied only to pictorial illustrations of works connected with the fine arts.

"And no prints or labels designed to be used for any other article of manufacture shall be entered under the copyright law, but may be registered in the Patent Office."

A definition of the term "*label*," as here used, is now required. It is:

"A small piece of paper, or other material, containing the

name, title or description, and affixed to indicate its nature or contents." Worcester's Dic.

"A label is a narrow slip of silk, paper, parchment, &c., affixed to anything denoting its contents, ownership, and the like, as a label of a bottle or package." Webster's Dic.

"Label. A placard or slip attached to an object to denote its contents, destination or ownership." Knight's Am. Mech. Dic. See Skeat's Etymological Dic.

In 1874, soon after the passage of the act under consideration, the Commissioner of Patents found it necessary to construe terms, and his definition has officially been used ever since. It is printed in his rules, as follows:

"The words "prints" and "labels," as used in this act, so far as it relates to registration in the Patent Office, are construed as synonymous, and are defined as any device, picture, word or words, figure or figures (not a trade-mark), impressed or stamped directly upon the articles of manufacture, or upon a slip of paper, or other material, to be attached in any manner to manufactured articles, or to bottles, boxes, and packages containing them, to indicate the contents of the package, the name of the manufacturer or the place of manufacture, the quality of goods, directions for use," &c.

That it is the label of commerce, so frequently discussed by courts in its relation to trade-marks, that is meant in this act, there is not a shadow of doubt; and petitioners concede this point.

It cannot be denied that Congress has power, in its regulation of commerce, to protect arbitrary symbols of trade. Trade-Mark Cases, *supra*; Registration Act of March 3, 1881; Amendatory Trade-Mark Act of 1882.

In protecting commerce, manufactures are incidentally protected.

"Manufactures and commerce are, it is plain to perceive, twin sisters. As they began life together, so in the race do they keep side by side." Browne on Trade-Marks, 78. See, also, "Definition and Nature of a Trade-Mark," *Ibid.*, pp. 53-93.

The convention between the United States and the German Empire, 1872, protects "marks or labels of goods, or of their packages," and also "patterns and marks of manufacture and trade." Sec, also, the declaration between the United States and Great Britain, of 1878, "for the reciprocal protection of marks of manufacture and trade," and "everything relating to property in trade-marks and trade-labels."

But those trade-labels must be peculiar and characteristic, something of the nature of a trade-mark, although not technically such. But one "has no right to appropriate a sign or symbol, which from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose." *Canal Co. vs. Clark*, 13 Wall.; *Manufacturing Co. vs. Trainer*, 101 U. S., p. 54.

In this latter case, the court cited *Baggett vs. Findlater* (Law Rep., 17, Eq., 29), where an injunction was refused to restrain the use upon a trade-label of the term "nourishing stout," which the plaintiff had previously used, on the ground that nourishing is a mere English word denoting quality. And the authorities throughout the domain of commerce are all one way on this point. But the act of 1874 does not make any exception. It is sweeping in its language, except that it excludes trade-marks. "Prints or labels," for "articles of manufacture." Any print, any label.

The act is void for uncertainty.

5. Congress exceeded its authority in passing the act of 1874.

If that piece of legislation has any basis, it must be found in the authority to "regulate" commerce. The Supreme Court said, *inter alia*, that after the commerce specially designated:

"There still remains a very large amount of commerce, perhaps the largest, which trade or traffic, being between citizens of the same State, is beyond the control of Congress." *Trade-Mark Cases*, *supra*.

But the act of 1874 is not restricted in its operation to the commerce under the control of Congress. The court said:

"When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it is apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress."

* * * "Here is no requirement that such person shall be engaged in the kind of commerce which Congress is authorized to regulate. It is a general declaration," etc. Trade-Mark Cases, *supra*.

Therefore, for the reason that section 3 of the act of Congress, approved June 18, 1874, entitled, "An act to amend the law relating to patents, trade-marks and copyrights," in regard to the registration of prints or labels in the Patent Office, is not warranted by the Constitution, the order made herein, for the Commissioner of Patents to show cause why *mandamus* should not issue, should be dismissed.

From the argument filed by the Commissioner the following is extracted:

By the act of June 18, 1874, the Commissioner of Patents is charged with the supervision and control of the entry and registry of prints and labels. It is his duty, therefore, to determine in every case whether or not the application preferred under that law presents proper subject matter for registration.

In the exercise of this duty it is necessary for him to determine the character of the matter offered for registration, and to ascertain that it is a lawful label within the meaning of the act.

The fact that a public officer is charged with the ministerial duties of signing, sealing, registering, and the like, carries with it, *proprio vigore*, the preliminary duty of ascer-

taining that a suitable case for action is presented. Thus, the Secretary of the Interior is not bound to sign a land patent brought before him in the usual routine of business as a patent for an invention; nor a register of wills to register a deed; nor a recorder of deeds to record a promise to pay; nor the Commissioner of Patents to record a contract for the sale of a machine, as an assignment of a patent right.

The Commissioner of Patents is required by said act to register a label, but not a design, a mechanical invention, or a trade-mark. It would introduce endless confusion into all questions of title if the allegation of the interested party as to the application of certain provisions of law to the facts of his case, were to be taken as conclusive. The respondent does not understand with the relators that the decision in the case of the United States, *ex rel.* The Willcox & Gibbs Sewing Machine Company *vs.* E. M. Marble (1 Mackey, 284), is at variance with the views here expressed. The decision upon the facts of the case was to the effect that a label which is otherwise a proper subject for registration, under the act in question, is not excluded from registration by the fact that it bears upon its face matter which might become a lawful trade-mark. The court did examine into the reasons which led the Commissioner to refuse the registry, and determining after investigation that the judgment of the Commissioner was erroneous, ordered the *mandamus* to issue.

It is respectfully submitted, therefore, that a fanciful design of the character of the one in question, not descriptive or suggestive of any trade or article of manufacture, and which might be applied as an ornament with equal propriety to a box of cigars, a bolt of cloth, a barrel of flour, or to an indefinite variety of articles of merchandise, or which might be preserved for its intrinsic merits as a work of art, or which might become a lawful trade-mark by its association with a particular brand or manufacture, is not a label within the meaning of the act of June 18, 1874. The statutory provisions relating to the same matter existing at the time

of the passage of this act, were as follows: Section 4937 of the Revised Statutes provided as follows:

“Any person or firm domiciled in the United States and any corporation created by the authority of the United States, or of any State or Territory thereof, and any person, firm, or corporation resident of or located in any foreign country which, by treaty or convention, affords similar privileges to citizens of the United States, and who are entitled to the exclusive use of any lawful trade-mark, or who intend to adopt and use any trade-mark for exclusive use within the United States, may obtain protection for such lawful trade-mark by complying with the following requirements:

First. By causing to be recorded in the Patent Office a statement specifying the names of the parties, and their residences and place of business, who desire the protection of the trade-mark; the class of merchandise, and the particular description of goods comprised in such class, by which the trade-mark has been or is intended to be appropriated; a description of the trade-mark itself, with fac similes thereof, showing the mode in which it has been or is intended to be applied and used; and the length of time, if any, during which the trade-mark has been in use.

Second. By making payment of a fee of twenty-five dollars in the same manner and for the same purpose as the fee required for patents.

Third. By complying with such regulations as may be prescribed by the Commissioner of Patents.

Section 4939 provided that: “The Commissioner of Patents shall not receive and record any proposed trade-mark which is not and cannot become a lawful trade-mark, or which is merely the name of a person, firm, or corporation unaccompanied by a mark sufficient to distinguish it from the same name when used by other persons.” * * *

Section 4952 provided that: “Any citizen of the United States or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue,

statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same." * * *

Under these provisions of law the designer, or those deriving legal title from him, might register a new and fanciful cut, print and engraving, as copyright matter, irrespective of the use or purpose for which it was designed; or he might register the same as a trade-mark to be applied to articles of merchandise by making the proper declarations to that effect, as provided in section 4937.

There is no reference in either or any of these sections of law to anything in the nature of a label. The designer of cuts, prints, and engravings, in common with authors, artists, &c., are rewarded for their ingenuity by a limited monopoly in the use of their productions. The proprietors of existing or prospective trade-marks are permitted to make registry of their marks, which are guaranteed a certain measure of protection forever, or so long as the registry shall be renewed.

The Librarian of Congress having brought it to the attention of Congress that great numbers of prints and cuts designed for the purpose of ornamenting and distinguishing, and thereby facilitating the sale of articles of merchandise, and valuable only in that connection, were being offered for registry under the copyright act, the law was amended by the act of June 18, 1874. The third section of that act provides:

"That in the construction of this act, the words 'engraving,' 'cut,' and 'print,' shall be applied only to pictorial illustrations, or works connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office. And the Commissioner of Patents is hereby charged with the supervision and control of the entry or registry of such prints or labels, in

conformity with the regulations provided by law as to copyright of prints, except that there shall be paid for recording the title of any print or label, not a trade-mark, six dollars, which shall cover the expense of furnishing a copy of the record under the seal of the Commissioner of Patents, to the party entering the same."

In the first clause of this section it is declared that no print, cut, or engraving, shall thereafter be registered as copyright matter which is not applied to pictorial illustrations or works connected with the fine arts. By this provision the law withdraws all protection from those spurious works of art now commonly attached to boxes and bundles of all descriptions, and which are not esteemed for their intrinsic value, but as lending a temporary and cheap adornment to perishable articles of merchandise. They may be more properly regarded as a commercial device than as a "writing" by an "author" tending to promote the advancement of science.

The succeeding clauses of the section in question, provide for the registry of prints and labels designed to be used for other articles of manufacture not connected with the fine arts; and charge the Commissioner of Patents with the supervision and control of the entry and registry of such labels. It is expressly declared that such prints or labels are "not to be entered under the copyright law," such registration not being regarded apparently as being within the sanction of the copyright and patent clause of the Constitution. What constitutional provision there is, or whether there is any, which authorizes legislation of this character, it is not now necessary to discuss. The act itself furnishes no definition of what constitutes a print or label. The word "label," as commonly understood, denotes a slip of paper or other suitable material attached to goods, giving a short description of their character, directions for their use, and other facts of interest to the purchaser. As defined in Webster's Dictionary, "a label is a narrow slip of silk, paper, parchment, &c., affixed to anything denoting its contents ownership, and the like, as a label of a bottle or package."

In the practice of the Patent Office a label has been regarded as consisting either of a written description or of a pictorial representation of the article itself, its mode of manufacture, or manner of use. As thus understood the section in question provides that a cut, engraving, or print may be registered as a work of art under the copyright law, and that a print of a descriptive character to be affixed to an article of commerce in the nature of a label may be registered in the Patent Office.

In further providing that only those prints and labels, "not a trade-mark," shall be registered, the act furnishes another indication that it is descriptive prints and labels alone which are the proper subject-matter for registry. A merely fanciful sketch or print when affixed to articles of commerce is, or may become by use, the lawful trade-mark of the owner. Such marks by excess of caution are discriminated in the act itself from the descriptive prints which form labels proper. As no examination is to be had under the provisions of the act as to any facts outside of the record, viz.: whether the purported label has or has not been used and, as the allegation of the applicant that his proposed label has not been used or published, is conclusive for the purposes of registry, it is evident that the Commissioner must determine from inspection only whether the alleged label seems to be, or is adapted by its nature to become by use, a trade-mark. It would be unlawful, therefore, for him to register as a label a mark which by use in commerce would become a trade-mark, or from its nature would inevitably lead the public, whether truthfully or by deceit, to assume that it is a veritable mark of trade.

It is apparent upon inspection, that the alleged label offered for registration in this case is purely fanciful and arbitrary in its proposed application. Whether or not it might in the hands of the designer be registered as a work of art under the copyright law, or as a trade-mark in the hands of the manufacturer who applies it, or intends to apply it to goods of his manufacture, it is not a label, as that word is commonly understood, nor as used in the 3d section of the act of June 18, 1874.

WM. H. BRERETON for relator:

The defendant bases his refusal to register this label on the ground that the same is not, in his judgment, a label, but is a trade-mark, and that the act of Congress, which changes the place of registry of labels from the office of the Librarian of Congress to the Patent Office, confers upon the Commissioner the right to determine whether the subject-matter of an application is properly registrable as a label, or should be registered as a trade-mark. See 22 O. G. Pat. Off., No. 15, page 1291.

Before the passage of the act of June 18, 1874, all prints and labels were registered in the office of the Librarian of Congress.

The statutory provisions under which prints and labels were then registered, and which governed and controlled the registry thereof and the rights of the parties thereunder, are found in sections 4948 to 4971 of the Revised Statutes. Sections 4956 and 4957 relate to the recording of such prints and labels, and the furnishing by the Librarian of a copy of such record. Section 4957 is in the following words:

"The Librarian of Congress shall record the name of such copyright book, or other article, forthwith, in a book to be kept for that purpose, in the words following: "Library of Congress, to wit, Be it remembered * * * * * And he shall give a copy of the title or description, under the seal of the Librarian of Congress, to the proprietor, whenever he shall require it."

A careful inspection of these various sections will show that the Librarian of Congress never had any power given him to exercise his discretion as to what labels or prints he should register, and what he should not, but, on the contrary, that, as to these matters, he merely occupied the position, and was to perform the duties of, a recording officer.

The proprietor of the print or label was the one to decide whether or not he desired to place his title thereto on record, and by so doing secure to himself the protection which the law afforded. And if he so elected, he was to furnish the necessary copies and pay the prescribed fees to the Librarian

of Congress, and otherwise to perform such acts as the law required as being necessary to the proper registry thereof. These things being done, the Librarian was to record said print or label, and was to furnish a copy, under seal, if the proprietor desired it.

The Librarian of Congress had no more right to refuse to record a print or label—on the ground that, in his opinion, it constituted a trade-mark—than a county clerk would have to refuse to record a deed on the ground that, in his opinion, it was not so drawn as to secure to the parties asking the record thereof the rights sought to be secured.

And we may say that, so far as we are aware, the Librarian of Congress never pretended to exercise any judicial powers in the registry of labels or prints, or of books or pictures.

Such being the law, Congress, on June 18, 1874, by the act referred to in the petition (18 Stats. at Large, p. 78), changed the place of registry of prints and labels designed to be attached to articles of manufacture from the office of the Librarian of Congress to the Patent Office. Section 3 of that act is as follows:

“SEC. 3. That in the construction of this act (the copyright act), the words ‘engraving, cut, and print,’ shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office. And the Commissioner of Patents is hereby charged with the supervision and control of the entry or registry of such prints or labels, in conformity with the regulations provided by law as to copyright of prints, except that there shall be paid for according to the title of any print or label, not a trade-mark, six dollars, which shall cover the expense of furnishing a copy of the record, under the seal of the Commissioner of Patents, to the party entering the same.”

It will be apparent that the duties of the Commissioner of Patents as to the registry of prints and labels are not changed by the act of June 18, 1874, from the duties exercised by the Librarian of Congress under the then existing

laws; the duties still remain the same, the only change being in the official by whom they are to be performed.

The same laws govern the registration of prints and labels in the Patent Office as prevail in the recording of copyrights in the office of the Librarian of Congress.

In the case of *Marsh vs. Warren*, reported in 14th Blatchf., p. 264, his honor, Judge Blatchford, said: "The statutory provisions which confer the rights and regulate the remedies of persons who register in the Patent Office, under the act of June 18, 1874 (18 U. S. Stats. at Large, 78), prints or labels designed to be used for any other articles of manufacture than pictorial illustrations and works connected with the fine arts, are those which are contained in sections 4948 to 4971 of the Revised Statutes, in regard to copyrights."

The acts of Congress relating to patents, also those relating to the registration of trade-marks, give the Commissioner the right to regulate the modus of applications, and the right to decide on the propriety of issuing patents or certificates of registration of trade-marks; but the act relating to labels and prints, bearing close analogy to the acts relating to copyrights generally, and being in truth but a branch of the latter, carefully abstains from granting, but a receiving and receipting, power to each of the recording tribunals. The evident intention of Congress was, in view of the multiplicity of business connected with the matter of securing copyrights, to place the burden of showing the legality of all the proceedings upon those who claim to have acted in obedience to the law. If one deposits with the Librarian of Congress the title of a book, claiming that he owns it, and that he is a citizen of the United States, or that the thing which he calls a book is in reality a book, it is not for the Librarian to inquire into the truthfulness of these assertions, but he issues his receipt, receives the papers and fees submitted, and leaves the party to such relief as owing to the proceedings had before him, and his other statutory rights the law entitles him to enjoy. Hence, it has frequently happened that persons, litigants in court, seeking relief for violation of their copyrights, were told by the court that their copy-

rights were not lawfully recorded; that the steps essential for the purposes of protection under the law, had not been correctly taken. *Clayton vs. Stone*, 2 Paine, 383.

Strictly analogous to this should be the proceedings relating to prints and labels. The act (June, 1874) does not say that the Commissioner shall exercise any discretion in this matter, does not say that he should make an examination into the matter, does not say that he should issue a certificate to the party recording a label, but simply provides that labels may be registered in the Patent Office, that the Commissioner is charged with the supervision and control of the entry of the registry of such prints or labels, and that when the fee of \$6 is paid this shall also cover the expense of furnishing "a copy of the record under the seal of the Commissioner of Patents," to the party entering the same.

The questions in the present case are not new, but have already been determined by this court in the case of *The United States, ex rel. The Willcox & Gibbs Sewing Machine Co., vs. E. M. Marble*, 1 Mackey, 284. The case now before the court is one of many of the same character.

Heretofore it has always been a rule of the Patent Office that the decisions of one Commissioner were binding upon his successors in office in cases where the same questions arose again, and were to be followed by them. But the defendant seems to disregard this rule, and either ignores decisions of his predecessors or else fails to avail himself of that ready means of acquainting himself with them which the Government places at his disposal. In the case of *Schumacher & Ettlinger*, reported in the printed volume of "Decisions of the Commissioner of Patents and U. S. Court" for the year 1876, page 75, Mr. Spear, acting Commissioner, held as follows:

"It appears from the record that these applicants applied for the registration of a certain print, the proper number of copies of which were attached to the application."

"The print is made up of a combination of colors, figures and words. * * *

"A certificate of registration was refused by the examiner, first, because the print amounted to a trade-mark, being purely an arbitrary symbol, and not in any one of its features descriptive; second, because it may become a trade-mark by adoption and use; and as applicants desire to multiply and sell copies of it, it would seem that protection should be sought under the law as a new and original design; and that to entitle the label to registration under the act of June 18, 1874, it must be 'intended to be used for some article of manufacture.'"

"The position taken by the examiner that the print is not intended for use for any article of merchandise, and therefore not capable of registration as a print or label, does not appear to me tenable.

"It appears from an inspection of the print, as well as from the statements of counsel for the petitioners, that this print is not 'connected with the fine arts,' but that it is designed for articles of manufacture.

"Now, if it is not connected with the fine arts as an engraving, cut, print or photograph, or painting, or any such thing recognizable at once as belonging to the fine arts, then these petitioners could have no protection by registration with the librarian of Congress. If they have none here, then none is provided for in law. But the registration of trade-marks in the Patent Office is an offshoot of the copyright law, and I understand that these prints or labels, whenever they are intended for use with articles of manufacture, may be registered in the Patent Office on exactly the same terms and conditions, except that a larger fee is paid, as works of art may be registered with the librarian of Congress.

"The fact that these parties make and sell these prints, and do not themselves apply them to articles of manufacture, should not, in my judgment, deprive them of protection in the right of exclusive manufacture of the thing which they have produced. There is no such requirement in the law, all that is there prescribed is that the prints or labels must be such as are 'designed for use' for articles of

manufacture. Nor in this case could the print be considered a trade-mark, inasmuch as it is not appropriated to any particular class of goods. The protection which they seek, and which a certificate of registration will give them, is no more than protection in the exclusive right to make and sell this particular print. The decision of the examiner is reversed." See also Com. Dec., vol. 8, Off. Gaz. Pat. Off., 277; *In re Orcutt & Sons*.

The Commissioner of Patents, when he undertook to exercise his discretion in registering this label, must also have been aware of Judge Blatchford's opinion in *Marsh vs. Warren*. Indeed, this opinion was considered of so great importance that it has been reported twice in the same volume. It will be found at page 161 of the Decisions of the Commissioner of Patents for the year 1878, and again at page 394 of the same volume.

The relators have not changed their business since the decision of Commissioner Spear, above quoted, and the label which they now seek to have registered is of exactly the character as that which he then held to be a label and not a trade-mark, and their exclusive right to make and sell which he said could only be secured by such registration.

But the present Commissioner says that what the relators have produced is a trade-mark, and that if they desire to protect their rights under the same, they must register it as a trade-mark; they can't pay six dollars to the government for a label when a trade-mark costs twenty-five dollars, and thus secure to themselves the same rights, as the Commissioner seems to imagine, that they would have under a trade-mark.

Another way of putting the present Commissioner's decision, is this: these relators make and sell certain labels (pictures); this is their business, and these labels are their goods; now, the Commissioner would compel these parties to register these goods as a trade-mark—that is, the goods themselves would be trade-marks of themselves. Such a position of affairs was never contemplated by any act of Congress, and never could arise but in the fertile brain of the defendant.

Aside from this, however, the picture sought to be registered is purely a label, and has not that essential characteristic of a trade-mark, i. e., that which distinguishes the goods of one manufacturer from those of another; there is no arbitrary name applied to this picture that would indicate origin or ownership of the goods to which it might be applied. Indeed, the relators can with perfect propriety sell this label to various merchants, its use being merely an ornament or finish to the boxes or packages containing goods, and in no way indicating that such goods are of a particular make.

We think that we have shown clearly that it is not the intention of the statute to invest the Commissioner of Patents with discretion in the registry of labels; that such has been the views of former Commissioners and that such has been the decision of this court; and further, that if he were clothed with judicial powers he could not refuse to register the label here sought to be recorded, as the same is, without a doubt, a label or print and not a trade-mark.

Mr. Chief Justice CARTER, after stating the case, delivered the opinion of the Court.

It is objected in behalf of the Commissioner of Patents that the act of Congress of June 18, 1874, providing for the registration of labels is unconstitutional and therefore void. A very elaborate, ingenuous, and perhaps, under appropriate circumstances, successful argument, has been made to sustain this position. But we think the point raised has no application to this case. We do not think it lies in the mouth of a government official to call in question the constitutionality of a law directing him to perform a purely ministerial duty. If the question was raised between other parties, as for instance, in a suit for infringement in the use of a label, and the constitutional rights of the parties were involved in it, that is to say whether one man was prohibited from using it because another man had regis-

tered it as a label, the argument might be pertinent, but we do not think it is a question which can be raised here.

The next reason assigned by the Commissioner for his refusal to comply with the petitioner's demand is that the design offered for registration is a mere fanciful sketch which, while it may be used as a trade-mark, has none of those descriptive features about it characteristic of a label. A label, it is contended, consists of a pictorial representation or a written description of the article to which it is affixed; and that a fancy picture, such as this, having no connection with its proposed use or application, cannot be registered as a label. This question has been settled by this court in the case of the Sewing Machine Co. *vs.* Marble.* We decided in that case that the duty of the Commissioner of Patents, on the application to him to register a label, is a purely ministerial one, as much so as the act of a recorder of deeds in placing upon public record a muniment of title. The statute has not defined what shall be considered a label, whether it shall be a picture or a writing; whether it shall be descriptive of the article to which it is affixed, or whether it may be a mere arbitrary design. If the applicant presents it as a label, and appeals to the Commissioner to give it the protection which the law provides for it as a label, the duty of the Commissioner is to register it, and in doing so he gives it only the protection which the statute provides. It is not protected as a trade-mark nor as a copyright. The public at large may use and enjoy it, but *qua* label it is restricted to the use of the party who has registered it for that purpose and no other. With the character of the device the Commissioner is not at all concerned. His function is as purely ministerial as it is capable of being. The writ will issue.

*1 Mackey, 284.

DENNIS LOONEY vs. DENNIS QUILL ET AL.

DENNIS QUILL vs. DENNIS LOONEY ET AL.

EQUITY. Nos. 8034 and 8193.

{ Decided December 17, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Where different parcels of, land, all subject to a common incumbrance, are conveyed to successive purchasers at different dates, the proceeds of the land must be applied in the inverse order of alienation to satisfy the first incumbrance; thus, L., being the owner of a lot of ground, gave a first deed of trust on the whole of it to Y. He then gave a second trust on a part of it to Q. Still later he conveyed the whole lot, except the part covered by Q.'s deed, to W.

Held, That the part conveyed to W. ought to be applied to satisfying the first incumbrance covering the whole property, before disturbing the part covered by Q.'s trust.

THE CASE is stated in the opinion.

T. F. MILLER, H. B. MOULTON, W. PIERCE BELL and A. B. DUVAL for Looney.

T. J. MILLER, R. B. LEWIS and W. R. RILEY for Quill.

Mr. Justice COX delivered the opinion of the court.

In the case of Dennis Looney vs. Dennis Quill, and others, and Dennis Quill vs. Dennis Looney and others, the facts out of which the litigation grew seem to be about as follows: Dennis Looney was the owner of two lots, Nos. 13 and 14, in square 624, which had a front of sixteen feet by a depth of one hundred and seventy-five feet. While he was so seized, he executed a deed of trust covering the whole property, to secure an indebtedness of a thousand dollars to Alexander H. Young. This was in 1874. In August, 1880, he executed a deed of trust to secure an indebtedness to Dennis Quill, of fifteen hundred dollars, on the front portion of these lots to the depth of one hundred and twenty-four feet. Afterwards, in March, 1882, he conveyed in fee simple to Johanna Wolf, the rear part of the lots, having a depth of fifty-one feet, in addition to the other depth I have already mentioned.

This litigation was commenced by a bill filed by Dennis Looney himself, against Quill and others to set aside certain

sales made by the trustees under Quill's deed. That was done; so that that case is out of the question and does not present any question for our determination. After this, Quill, who had the second deed of trust on a part of the property, filed his bill to marshal the assets, asking that the part conveyed to Mrs. Wolf by the third deed I have mentioned, should be first applied to the satisfaction of the common encumbrance that covered the whole property, before that part should be disturbed on which he, Quill, had the second deed of trust. Mrs. Wolf came in, by petition, and was made a party defendant, and claimed that she had purchased the property and taken her conveyance, in ignorance of the existence of any encumbrance, and that, as an innocent purchaser, she had a right to ask that Young be compelled to exhaust his security upon the front portion of the property, being the first parcel that was conveyed away by Looney, before resorting to the part that was conveyed to her.

The case went to the auditor. The court, in the first place, decreed that the whole property should be sold, but in two separate parcels, just according to the deeds I have mentioned, one parcel being that in the deed of trust to secure Quill, being the front part of the lots having a depth of one hundred and twenty-four feet, and the second being the rear portion which was conveyed to Mrs. Wolf, having a depth of fifty-one feet; and the property was sold and the proceeds brought into court, and the case referred to the auditor to apply the proceeds according to the established rules of law. The auditor took the view which is maintained by the complainant, that the proceeds of the part conveyed to Mrs. Wolf by the last deed, ought to be first applied to satisfying the first encumbrance covering the whole property: Mrs. Wolf excepted to this report, and the exception was overruled and the auditor's report affirmed by the decree below, from which the appeal is taken to this court.

So that the case is simply this: Looney, the debtor, first gave a deed of trust on the whole of his property; next, he gave a deed of trust on a part of it to Quill; and third, he

conveyed the remaining part to Mrs. Wolf. Now the question is whether Quill has a right to require that the part last conveyed—Mrs. Wolf's part—should be first applied towards satisfying Young's first encumbrance, or has she a right to claim that the part conveyed before her deed, be exhausted before her part is resorted to.

The case appears to be, at first, a little complicated by another circumstance, and that is, that Quill, when he took the first junior encumbrance on a part of this property, took, in the same deed, an encumbrance on other property outside. Undoubtedly Mrs. Wolf would have a right to require him to exhaust that first. But that had been exhausted and yielded almost nothing; consequently that does not embarrass the controversy, but leaves it simply a case of two junior alienees of parcels of property covered by a previous encumbrance.

Now, the doctrine that in the case of different parcels of land, all subject to a common encumbrance, conveyed to successive purchasers at different dates, the proceeds of the land shall be applied in the inverse order of alienation to satisfy the first encumbrance, it is entirely unnecessary to discuss, because it is not a new doctrine. It is the established law of this court, and has been settled for this District by the Supreme Court of the United States in a rather recent case. The authorities on this question, which are numerous, are collected in the case of *Aldrich vs. Hooper*, in 2 *Leading Cases in Equity*, and they make no distinction, so far as we have been able to observe, between successive encumbrances by the way of deeds of trust, and successive alienees in fee simple or for lesser absolute estates, and I have never found any case which made distinction between them. The controversy generally has been whether the first encumbrance, covering the whole property, should be borne ratably by the subsequent successive alienees, or the rule should be what I have already stated, viz., that the property should be applied in the inverse order of alienation. The latter is the doctrine which has the great weight of authority in its favor; but there is no authority for the prop-

osition that the last alienee of part of the land is entitled to have the first encumbrance thrown first on a prior alienee, which is what Mrs. Wolf is contending for in this case. We think the auditor was right, and the court below was right, in making the application of the proceeds of Mrs. Wolf's property, even supposing her purchase to be a *bona fide* one, to the satisfaction of Young's encumbrance, before the proceeds of Quill's part could be applied to the same encumbrance. But I believe we are all more than doubtful about the *bona fides* of the deed to Mrs. Wolf. It rather seems to us to have been a deed without consideration, and to have been made for the purpose of shielding this property from the claims of creditors, and if that is so, it is to be dealt with as property remaining in the hands of the debtor, the mortgagor. There is no doubt about the rule that the junior encumbrancer of a part of the property included in the first encumbrance would have the right to require the remaining property in the hands of the debtor to be applied to satisfying the first encumbrance before that covered by his own is resorted to.

The decree below is affirmed.

JOHN FREDERICK MAY vs. WALTER H. SMITH.

LAW. No. 20,521.

{ Decided January 14, 1884.
{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

1. One cannot have a right of way over his own land as something separate from the fee simple ownership; all such rights are considered merged in the ownership of the soil. Consequently where the owner of a lot which extended from the street in front to an alley in the rear, sells, "with the appurtenances thereto belonging," a portion of the lot, which portion fronts upon the street but does not quite extend to the alley, the term "appurtenances" does not carry with it a right of way to the alley over the part not sold. Such a right can only be conveyed by express grant.
2. The owner of an easement in land can abandon or extinguish it if he chooses, and if he does so, and afterwards sells the land, the easement is no longer incident to it.
3. Where a house is sold "with the lot attached," the question as to the extent and boundaries of the latter is one of fact for the jury.

THE CASE is stated in the opinion.

W. B. WEBB for plaintiff.

W. H. SMITH for defendant.

Mr. Justice COX delivered the opinion of the court.

This is an action of trespass on the case, brought for an alleged obstruction of the plaintiff's right of way over land belonging to the defendant. The way is described in the declaration, as follows:

"An alley, or way of eleven feet seven and a half inches wide, leading from the alley heretofore laid out in said square [456] by the commissioners in the division of said square between the original proprietors and them, and thence to the north end of the above described moiety herein conveyed."

The declaration had previously averred that the plaintiff was seized of part of lot 7 in square 456, to which the claim is made that the right of way was an appurtenance. The verdict was rendered in favor of the plaintiff; but several exceptions were taken in the course of the trial by the defendant, and the case comes up here on a motion for a new trial, based upon those exceptions.

In order to make the case intelligible it is necessary to give some explanation of the *locus in quo*. Lot No. 7, in square 456, fronts on the north side of E street, and is the second lot in the square counting eastwardly from 7th street. It has a front of 59 feet 11½ inches. Of course 29 feet 11½ inches would be one-half the front of the lot. The plaintiff shows a conveyance from Alexander Kerr to John H. Oswald, dated May 17, 1800, conveying the west half of lot 7 in square 456, with appurtenances, and "the free use, privilege and convenience forever of an alley or way, 11 feet 7½ inches wide, leading from the public alley heretofore laid off by the commissioners in the division of the square between the original proprietors and them; and thence to the north end of the above described moiety or piece and parcel of ground," intended to be conveyed. That is to say, the deed conveyed the west half of lot 7 in square 456, of the width of 29 feet 11½ inches, and running back 99 feet 8 inches, together with an alley or way of the width of 11 feet 7½ inches running east and west to the north end of this half lot from the public alley in the middle of the square. Of course this alley was taken out of the land of somebody else.

By sundry conveyances, this property, on the 15th of May, 1858, became vested in James J. Waring. Waring afterwards purchased part of the east half of the same lot, adjoining what he already owned, this last purchase having a front on E street of 14 feet 11¾ inches, and running back that width 88 feet 1½ inches, to the alley reserved for the west half of the lot. So that, by these sundry conveyances, Waring became entitled to the west half of the entire lot 7 and the alley way, 11 feet 7½ inches in width, running from the northeast corner to the middle of the square, and also an additional strip contiguous thereto, and running back to that alley.

In December, 1860, Waring made a deed of trust to Wm. B. Webb and Robert S. Patterson, in order to secure a certain debt therein recited, conveying the whole of the property acquired by him as above mentioned. On the 21st of

July, 1862, Webb and Patterson sold a part of this property which they thought sufficient to pay the debt. They describe the part sold as the "brick house built on lot 7 in square 456, as the same is laid out and described on the ground plan of the city of Washington, and the lot attached to the same, together with all and singular the improvements, ways, rights, tenements and hereditaments and appurtenances unto the same belonging or in any way appertaining." This brick house had a width of 22 feet 5½ inches, so that that was sold from off the west half, leaving a strip of that west half, still in Waring, 7 feet 6 inches in width, in front.

The question is made, how far back the lot so sold extended. The house was sold, and the "lot attached to the same." It is in proof that from the east wall of the house there was extended, to a point 29 or 30 feet from the north line of said lot 7, a fence which was continued from that point westward across the lot so as to make a complete enclosure, that enclosure thus being 29 or 30 feet from the north end of the lot, at which end this alley begins. The pertinency of the question thus becomes obvious.

The plaintiff claims that a stable had been erected by Waring on the northeast corner of his premises in such a manner as to entirely cover the way named in the deed from Kerr to Oswald, and extending about 22 inches over the east line of the house extended. We assume for the present that the lot sold did extend to the rear of the entire lot 7. At that point there was a strip of land left at the west part of lot 7 not conveyed by the trustees, and the title to which still remained in Waring, 9 feet in width, between the lot sold by the trustees and the commencement of the alley which has already been described; and the main question is whether, under these circumstances, the purchaser under that deed took the right to cross that intervening strip for the purpose of communication with the public alley. It should here be stated that the purchaser under that deed of trust sale was J. F. Callan, who subsequently conveyed to

Dr. May, and after that Waring conveyed all the remaining part of lot 7 that he owned to the defendant.

The plaintiff claims that after this conveyance to Callan, he had the privilege for a short time of going from the north part of this lot through a stable door in the west end of the stable to the alley; but he complains that afterwards the defendant closed up that door and cut off all access to the alley.

The case then is presented, in the first instance, of a conveyance of part of a lot from one end of which an alley is laid out, and which part is separated from that alley by the intervening part remaining in the grantor, and the question is, whether that conveyance gives the grantee a right of way over the remaining part to the public alley.

To maintain that, the plaintiff says, in argument, that this alley was laid out for the benefit of the whole lot that was conveyed in 1800 by Kerr to Oswald. In other words, he must claim that the way extended within the lot conveyed in fee, and to every part of it, and back from every part to the public alley. In terms, the alley is laid out *to*, not *into*, the north end of the lot which is conveyed in fee simple, and by the ordinary construction of language, the lot conveyed in fee simple is the terminus and limit and boundary of that way. In this case there was no right of way from the western part of this lot conveyed in fee simple to the eastern part, *as a separate easement or incorporeal hereditament*. A man cannot have a right of way over his own land as something separate from the fee simple ownership; all such rights are considered merged in the ownership of the soil. Consequently, if Waring conveyed away a part of this lot, he did not convey with that, under the head of "appurtenances," a subsisting easement or right of way to go from the part of it which he conveyed to any part of that which remained vested in him. If a man owns a tract of land in fee simple, and afterwards conveys it in separate parcels, that does not carry with it, as incident to it, a right to pass over the remaining part of it. The law does not imply such a right;

it must be expressed. Consequently, also, from the very nature of the case, if land is subdivided in that way, and the alley or road touches only one part of the land, it cannot be an appurtenance to any part of that land which it does not bind upon and in connection with which it cannot be used. It is therefore impossible to see how the conveyance of the western half of the lot, either by Waring directly, or by him through trustees, could give any right of way to pass over the eastern half of the lot to the alley which only touched it on the east.

These are conclusions which seem to us to follow irresistibly from elementary principles, and they are amply sustained by authority. In the case of *Oliver vs. Hook*, 47 Maryland, 301, it appeared that the owner of a tract of land had been in the habit of using a road from one part of his land to another. Afterwards, he subdivided and sold it, and the grantee of one of the subdivisions claimed the right to use the way over the other parts as against the other grantees. But the court, in speaking of the plaintiff's title, says:

"The deed is for a specific piece of land, being a parcel of a larger piece held and owned by the grantor, and described by metes and bounds. In such case, in the absence of apt and express terms, no specific way outside the limits of the land granted, if not properly an existing easement, will pass as appurtenant. The only words in the deed to Minnick that could possibly be relied on to convey the right of way in question, are, 'all and every the rights, privileges, appurtenances and advantages to the same belonging, or in any wise appertaining.' If there was a way belonging to the estate, as a pre-existing easement, such way would pass by force of these terms, or even without the use of them; but such terms used in a conveyance of part of a tract of land, as in this case, will not create a new easement, nor give a right to use a way which had been used with one part of the land over another part, while both parts belonged to the same owner, and constituted an entire estate. A party cannot have an easement in his own land, as all the uses of an easement are fully comprehended and embraced in his gen-

eral right of ownership. *Whalley vs. Thompson*, 1 Bos. & Pul., 371; *Gayetty vs. Bethune*, 14 Mass., 49; *Grant vs. Chase*, 17 Mass., 443; *Pheysey vs. Vicary*, 16 M. & W., 483; *Worthington vs. Gimson*, 2 El. & El., 624; *Thompson vs. Waterlow*, L. Rep., 6 Eq. Cas., 36. If apt and appropriate terms had been used in the deed, such as 'with the ways now used,' or 'used with the land hereby conveyed,' they would have passed the right to such ways as had been actually used in connection with the part granted; not, however, as existing easements, but those terms would have operated to create new easements for the benefit of the estate granted. Washb. on Eas. (3d ed.), 59.

"The general principle is, that no right in a way, which has been used during the unity of ownership, will pass upon the severance of the tenements, unless proper terms are employed in the conveyance to show an intention to create the right *de novo*. *Pearson vs. Spencer*, 1 B. & S., 571."

It is, therefore, we think, very clear that when the western part of this lot was conveyed, there was only one of two ways in which a right could have been conveyed to pass over the land remaining in Waring to the public alley; one was by granting it expressly; another would have been by granting the land under such circumstances that the grantee could have had no way out to a public highway except through the land retained in the grantor, and that would be called a way of necessity. But that could not apply to this case, because the entire front of the lot conveyed was upon E street, a public highway, so that there was no necessity for a way over the defendant's land to reach a public highway.

We have had several cases cited to us, on behalf of the plaintiff, to establish the general proposition that where a use is appurtenant to a tract of land, which tract is subsequently subdivided and sold, the appurtenance belongs to all the conveyed parts. And that is perfectly true where, from the nature of the case, the way is capable of being used by all the parts, as where they all border upon a public way. A case particularly relied upon by the plaintiff was

That of *Watson vs. Bioren*, 1 Serg. & Rawle, 227. In that case, there was a lot fronting on a public street, which lot ran back to an alley. The owner sold off the larger part and retained part at the rear corner, binding the alley. There it was held, of course, that as every part on the alley had a right to use it, the part which the owner retained had the privilege. There were also several other cases relied upon by the plaintiff: *Lansing vs. Wiswall*, 5 Denio, 218; *Underwood vs. Corney*, 1 Cushing, 592; and *Kilgour vs. Ashcorn*, 5 Harris & Johnson, 82; in all of which it appears that the parcels into which the original tracts had been divided were all bordering upon a highway or private way, or so attached as to be capable of being used in connection therewith. Those cases are clearly not applicable here. Here the land granted could not be used in connection with the way without an additional grant of a right of way over that portion the title to which was retained in Waring.

With these views, we think it is apparent that the plaintiff cannot maintain this action upon the facts shown. He had no title to this right of way, and therefore there was error in the refusal of the court to give the jury the 10th instruction on behalf of the defendant, which was as follows:

"If the jury find from the evidence that the property of the plaintiff does not extend to the western terminus of the right of way granted by the deed of Kerr to Oswald, and that the terminus of such way is not, at any point, on the land of said plaintiff, but that there is a space of not less than nine feet between the terminus of said way, as described in the terms of the grant, and the east line of plaintiff's premises, they must find for the defendant."

We think that, with the views of the law which we hold, that instruction ought to have been granted. We think also that it was error, for the same reason, to refuse the 7th instruction, asked on behalf of the defendant, which was to the effect that there was a variance between the pleadings and the proof as to the location and terminus of the alleged right of way, and for that reason the verdict of the jury should have been for the defendant. The allegation in the

declaration is that the plaintiff had a right of way extending to his premises, while the proof is, that the right of way upon which he relied did not come within nine feet of his premises; so that there was a variance between the declaration and the proof.

This conclusion of ours is decisive of the case, and we do not know that it is necessary to say anything more about it. But perhaps it may be just as well to advert briefly to one or two other features.

It appears in proof that while Dr. Waring owned this property, he built a brick stable on the north end of the lot, about 25 feet square, and that that stable covered over the entire space through which the lot would have to be reached from this alley, and covered over part of the alley itself. Even if it should be assumed that the right of way existed as an easement, from the public alley all the way to the western part of the plaintiff's lot, while the land was owned by Dr. Waring, yet nothing is better settled than that the owner of an easement in land can abandon or extinguish it if he chooses. I do not know of any more effectual way of extinguishing such a right of way than blocking it up as by the brick stable spoken of. Having extinguished or abandoned it, if he sells the property afterwards to another, there is no longer a right of way incident to it; it is gone; In this case, it is apparent, from the facts, that this right of way, as far as it could be considered a right, to the north-western part of the lot, was effectually destroyed by this structure.

The defendant below asked the court to instruct the jury that if they find, that the said Waring, while he was the owner of both tracts now in controversy, erected the stable, as claimed by the said defendant, on said premises, and that said stable extended over the entire right of way on the east half of said lot 7, as far as the east line of said defendant's premises, and also over not less than nine feet of the west half of said lot 7, and that said stable has been continued up to the present time, then the plaintiff is not entitled to recover, and your verdict should be for the defendant.

We are not so sure that that ought not to have been put in a conditional instead of being in an absolute form. But the principle involved in the instruction is correct—that if the stable did cover all the way, so as to make it impracticable to use it, then it did extinguish the right of way, and it did not exist at the time the trustees conveyed the western part of the lot to Callan, the grantor of the plaintiff. The plaintiff may say that he looked at the record title of the property and did not see any evidence of any extinguishment of the right of way. But that is not sufficient. He was bound to see the condition of the lot, and see that there was a brick stable on it obstructing any access to the alley. That doctrine is plainly stated in *Vogler vs. Geiss*, 51 Md., 408. The plaintiff says that after this stable was built, the right was exercised by him of passing through a door in the northwest corner of the stable, so as to obtain access to the public alley. That, however, is not the right of way claimed in the declaration, but something entirely different.

From what I have already said, it is obvious that no title has been made out to that right of way. If it was used under a license, that was revocable, and the length of use was wholly insufficient to make out title, because it did not last more than eleven or 12 years. The door was closed between 1862 and 1873. So that there is no evidence of title, even if there was no variance between the right of way thus claimed to have been exercised and that which is claimed in the declaration. It might be that the trustees under the deed could have sold the western part of the lot with an express grant of a right of way; but, in point of fact, they did not, and upon the grounds I have mentioned, it is impossible to recognize it.

There is another question upon which we think there was error in the court below, although it is immaterial to affect the result. The brick house was sold, as already stated, "with the lot attached." There was an enclosure connected with this house, and there is very strong ground for believing that that was "the lot attached;" it extended to a point twenty-nine or thirty feet short of the rear line of the entire

lot, making it still more impossible for the plaintiff's grantor to have access from that to the public alley. It was a question of fact for the jury, whether or not that was the lot. The defendant asked the court to instruct the jury that if they find that the fence which enclosed the lot "attached" to the plaintiff's brick house was, at the time of the sale by the trustees to Callan, at the place claimed by the defendant, then their verdict should be for the defendant.

Perhaps that was a little too strong, but the court went just as strongly in the opposite direction, and instructed the jury, that the deed from the trustees to Callan conveyed to him the lot according to the plan of the city, and not a part of it; that is, a strip of land, as wide as the brick house, up to the north line of lot 7, and bounded by the west line of said lot 7, and the east line of said brick house, and this, too, although it might take in nearly two feet of the stable.

We think that was clearly taking the facts away from the jury. It is not material, however, because upon the whole case it is plain the plaintiff had no title to this right of way, and therefore the verdict must be set aside and a retrial awarded.

CHAS. WALTER ET AL. *vs.* F. K. WARD.

EQUITY. No. 8815.

{ Decided January 21, 1884.
 { The CHIEF JUSTICE and Justice Cox sitting.

1. In a case involving a question of law of great public interest and of great difficulty this court has sometimes directed a rehearing before the full court, but it has never been its practice so to refer questions of fact which have been once fully discussed.
2. In a case which was heard before more than a legal quorum of the court and which involved merely the application of well-settled and undisputed principles of law to the facts, the court announced its judgment without rendering an opinion; *Held*, That the fact that no opinion was rendered afforded no ground to grant a motion for a rehearing before a full court.
3. A justice having no previous connection with a case, except to grant, at Special Term, a preliminary injunction on *ex parte* affidavits is not thereby disqualified to sit upon the final hearing of the case in General Term.
4. A decree may be amended so as to allow costs to the party entitled.

THE CASE is stated in the opinion.

RIDDLE & DAVIS for plaintiff.

R. ROSS PERRY for defendant.

Mr. Justice Cox delivered the opinion of the court.

In the case of Walter and others against Ward, a motion was made by the defendant for a reargument before a full court for the following reasons: First, because of the general interest in the question of law involved in the case; secondly, because no opinion was pronounced by the court as to the law in the case; thirdly, because Mr. Justice Hagner was disqualified to hear the same in General Term. It should be remarked here, that Mr. Justice Hagner declined to participate in the consideration of this motion. When a case argued before us involves a question of law of great public interest and of great difficulty, we have sometimes directed a rehearing before the full court. We have done so recently in the case of *Justh vs. Holliday*, which involves the legality of the purchase and sale of stocks on speculation, and perhaps in one or two other cases. But the present case is not of that character. It does not involve any question of law which is litigated or vexed, or about which

there was any discussion. The counsel for the complainant was disarmed as soon as he commenced to argue the law of the case by the disavowal on the part of the defence of any dissent from his position. There is, therefore, no question involved in the case which requires the determination of a full court. The only question is the application of very well settled principles of law to the facts. From beginning to end, it was simply an inquiry whether the establishment of the defendant in this case was, as a question of fact, a nuisance. It has never been our practice to refer a question of fact, which has once been fully discussed, to the full court; the business of the court does not admit of it. The case was heard at great length and very patiently before more than a legal quorum of the court, and before as many judges as are ordinarily assembled to hear any case. We have given it the fullest consideration we could, and we do not think we would be justified in arresting the business of the Special Term, for the sake of having the question of fact reviewed in a full court; the condition of business makes it almost impracticable, and we do not think it justified except in the case of a question of pressing public interest and great difficulty.

The second reason assigned is, because no opinion was pronounced by the court as to the law of the case. No opinion was pronounced, simply because there was no discussion or dispute about the law of the case; hence we were not called upon to render an opinion, and do not now feel called upon to do it.

The third reason assigned was, because Mr. Justice Hagner was disqualified to hear the case in General Term. That is quite a mistake. This was not an appeal from any order or decree rendered by Mr. Justice Hagner. He had no previous connection with the case, except to grant the preliminary injunction upon *ex parte* affidavits. Nobody imagines that the judge at Special Term who grants the preliminary injunction, would be thereby disqualified to hear the case at final hearing on pleadings and proof. Such a thing was never heard of. When the case was certified

to us in the first instance here, it was referred to the same Judge and two other judges to do what he was qualified to do in the court below. There is no disqualification legally or morally. We are of opinion, therefore, that no sufficient reasons have been assigned for referring this case to a full court. We have given the case all the consideration that we could give it, but we are very glad that the way is open to the defendant to the Supreme Court of the United States.

At the same time that this motion was made, there was also a motion made on the part of the complainant to amend the decree by allowing costs. We had passed over that subject in giving the decree in the first instance, not being advised what the disposition of the parties was, and we did not know but that they would consent to divide the costs between them. Undoubtedly, the complainants are legally entitled to recover costs, if insisted upon. There was an understanding between the counsel that the cost of printing the record was to be divided. But the motion is made that the clerk allow the complainants their regular costs, to be taxed by the clerk, in the case, in addition to one-half of the cost of printing the record, which has been paid by the defendant, and which the complainants agreed to refund to him. We think that motion must be granted, and that disposes of the case.

SAMUEL C. RAUB, Executor,

vs.

THE MASONIC MUTUAL RELIEF ASSOCIATION and
MARY E. HOPKINS.

EQUITY No. 8004.

{ Decided February 4, 1884.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. In an ordinary case of a decree against two joint defendants, one of them cannot separately appeal; but where the real contesting parties are the plaintiff and one of the defendants only, the other having no interest in the suit, a decree in favor of the plaintiff is virtually a decree against such defendant only, and he may appeal therefrom notwithstanding no appeal is taken by the other defendant.
 2. Where an association is chartered by an act of Congress, any by-law of such association, contrary to the provisions of the charter, is in effect a by-law in violation of a statute of the United States, and will, if for no other reason, be void.
 3. By its charter the object of an association in the nature of an insurance company was declared to be "to provide and maintain a fund for the benefit of the widow, orphans, heir, assignee or *legatee* of a deceased member." One of the by-laws provided that "no change of beneficiary can be made or recognized until submitted to and approved by the board of directors." A member being in good standing in the association, had named his sister as his beneficiary, with the consent and approval of the board of directors. Afterwards, he made a will, directing the fund derived from his interest as a member of the association, to be paid at his death to his illegitimate son. The association had no knowledge of this change, and on the death of the member, the sister claimed the fund.
- Held*, That the son was entitled to the fund, for the reason that the charter recognized the right of the member to designate the beneficiary by his will; and so far as any by-law attempted to cut off or diminish this right, it was inoperative.

STATEMENT OF THE CASE.

Dr. George N. Hopkins, a member of a Masonic lodge in Washington city, in good standing, in April, 1876, made application to the Masonic Mutual Relief Association for membership. In his application was the following:

"*Fifth*. I direct that, in case of my decease while a member of the above-named association, the moneys to which I may be entitled as such member, shall be paid to my sister,

Mary E. Hopkins, who now resides at Washington, D. C., *unless I should hereafter otherwise direct.*"

On the approval of this application, a certificate was issued by the association, dated May 1, 1876, as follows:

"This is to certify that George N. Hopkins, a Master Mason, and member of Hiram Lodge No. 10, of Washington, D. C., has paid the sum of four dollars, and is hereby constituted a member of the Masonic Mutual Relief Association of the District of Columbia, and is entitled to all the benefits of said association, upon his paying into the treasury thereof the sum of one dollar and ten cents within the time prescribed by the by-laws of the association, after receiving notice of the death of a member of the same."

June 5, 1878, Hopkins had an illegitimate son born to him, whom he named George H. Hopkins.

November 3, 1879, he executed his last will, designating this son as the beneficiary of his interest as a member of the association, and naming the executor of his will as trustee of the fund. Of this designation the association had no notice.

The second section of the charter of the association defines its objects to be "to provide and maintain a fund for the benefit of the widow, orphans, heir, assignee or legatee of a deceased member, immediately upon proof of such death."

The fourth section of the charter authorized the directors to make by-laws, &c., "not contrary to this charter, or to the laws of the United States."

Section 4 of Article VI of the by-laws of the association, in reference to a change of beneficiary, provides, "that no change of beneficiary can be made or recognized until submitted to and approved by the board of directors."

Dr. Hopkins died November 18, 1881. His will was proven, and letters testamentary issued to complainant, who thereupon demanded the fund. Payment being refused, he brought this suit.

The only question raised by the answer of the association was, that there had been no change of beneficiary recognized by it.

Mary E. Hopkins answered, claiming that the money belonged to her in her own right, and prayed that she might be "hence dismissed," &c. The cause was heard on bill and answers, and a decree entered directing the association to pay the fund to the complainant.

From this decree the defendant, Mary E. Hopkins, appealed. No appeal was taken by the association, and as no supersedeas bond was filed, the money was paid over to complainant.

EDWARDS & BARNARD for complainant:

1. The appeal of Miss Hopkins brings to this court no question for its determination, this not being a bill of interpleader, and she having filed no cross-bill, and asked for no affirmative relief in her answer, she only asks to be "hence dismissed," &c.; and the decree, directing payment to complainant by the association, *at complainant's cost*, is, in effect, a dismissal as to her. It relieves her from the costs of the suit, and she cannot be aggrieved thereby, having asked for no decree in her favor, and the court making none against her. R. S. D. C., Sec. 772; 2 Daniels Chan. Prac., 1541 and note, 1648-50; Wash. R. R. *vs.* Bradleys, 10 Wall., 302.

The association is a mutual benevolent society of Masons, organized under act of Congress, approved March 3, 1869 (15 Stats. at Large, 334), which act was amended March 3, 1875 (18 Stats. at Large, 508).

The second section of its charter provides, "that the particular business and objects of such society or corporation shall be to provide and maintain a fund for the benefit of the *widow, orphans, heir, assignee or legatee* of a deceased member, immediately upon proof of such death."

The fourth section authorizes the directors to make by-laws, &c., "not contrary to this charter, or to the laws of the United States."

The fifth section provides that its funds, property and effects shall never be divided among the members of said society, but shall descend to their successors, "for the promo-

tion of the principles of the said corporation and the benevolent purposes of the society which they represent. But this provision shall not prevent the said board of directors from carrying out the principles of the society or corporation, viz., to the widow, orphans, heir, assignee or legatee of a deceased member, as many dollars as there are members in good standing on the books of the corporation."

The by-laws make no provision as to how the person shall be named who is to receive the benefit of this contribution of one dollar from each survivor, on the death of a member; but the contract for its payment is one between the member and association only, and may be forfeited by default of the member in various ways, and can only be kept in force by payments made by the member, and his continued good standing as a Mason. The practice has been to allow the member to name the beneficiary, either in his application or afterward, and to change the same at his pleasure, if approved by the directors. One by-law provides:

"That no change of beneficiary can be made or recognized until submitted to and approved by the board of directors."

Should this by-law be construed as applying to an appointment of a payee by will? And if so, would it, in that event, be authorized by the charter of said society?

If no appointment had been previously made, there could be no doubt of the member's right to make one by his will, without submitting it to the board. And in this case, where a payee is named *conditionally*, and such conditional nomination is accepted and acquiesced in by the association, has the member not reserved to himself the same right of appointment by will?

The by-law was evidently made for the benefit of the association, and not to give any additional title to a payee named; and if it is constitutional, it is a rule that the association might waive, if so disposed; and its waiver, or repeal, could not be prohibited by any beneficiary before designated.

The right of a man who contracts with a corporation for the payment of money to another person after his death, to change the beneficiary, has been the subject of much contro-

versy. If the contract is one between him and the insurer only, and he pays the consideration therefor, it seems to us that in natural justice and right he should be allowed to change the object of his bounty at any time during his life, while he retains testamentary capacity, as freely as he might change the legatees in a will; and certainly with the prior consent of the company, or its subsequent acquiescence. In either case the gift is not effectual, no benefit accrues to the donee until after the death of the donor.

The right of a beneficiary in a policy of insurance, or of a legatee named in a will, is only an *expectancy*, during the life of the insured or testator, subject to be determined any day by forfeiture of policy, or change of will, or, in this association, by change of beneficiary by the member and board of directors.

1. This association differs very widely from an ordinary life insurance company. It has no capital, but only undertakes to collect and pay over assessments as mutually agreed upon between its members. *Worley vs. N. W., Mas. Aid A., 3 McCrary C. C., 53*; *Bunyon on Life Asso., 176, 185, 369*; *Ballou vs. Gile, 50 Wis., 614*; *Mills vs. Rebstock, 29 Minn., 380*; *Neskern vs. N. W. End. Asso., 30 Minn., 406*; *Com. League Asso. vs. People, 90 Ill., 166*; *Masonic Relief Asso. vs. McCauley, 2 Mackey, 70*.

2. The by-law aforesaid should not be construed to apply to a beneficiary named by will, as the charter contemplates payment to a *legatee*, and it is always lawful to change a legatee. *Sup. Council vs. Priest, 46 Mich., 429*; *Kerman vs. Howard, 23 Wis., 108, 112*; *Md. Mut. Soc. vs. Clendennin, 44 Md., 429*; *Arthur vs. Odd Fellows' Asso., 29 O. St., 557*.

The contract of insurance is to be construed most strongly against the company; and there is no reason why this by-law should apply, as a legatee could have no interest, and could not be positively known or fixed with certainty, until after the death of the insured. *Nat. Bank vs. Ins. Co., 95 U. S., 673*; *16 Fed. Rep., 720*.

In this respect the contract might well be construed like a fire insurance policy, which provides that it shall be void

assigned without the consent of the company. If the assignment in such case is made, after liability is fixed by a, it is valid. *Spare vs. Home Mut. Ins. Co.*, 15 Chic. Leg. News, 415; *Carroll vs. Charter Oak Ins. Co.*, 38 Barb., 2; 40 Ib., 292.

The will does not speak until the death of the maker, when the loss has occurred and the liability is fixed.

Besides, this by-law, made only for the association, may all be waived by it; and in this case it has been waived by the payment to complainant of the money, without appeal; and it is not competent for the *appellant* to say that the association may not waive the same. *Ins. Co. vs. Norton*, 96 U. S., 234; *Mut. Prot. Ins. Co. vs. Hamilton*, 5 Sneed, 269; *N. Y. L. Ins. Co. vs. Flack*, 3 Md., 341.

3. The appellant had no vested interest in this fund by virtue of her conditional nomination as payee. *Clark vs. Grand*, 12 Wis., 224; *Landrum vs. Knowles*, 22 N. J. Eq., 4; *Rison vs. Wilkinson*, 3 Sneed, 565; *Gambbs vs. Cov. Mt. Life Ins. Co.*, 50 Mo., 44; *Richmond vs. Johnson*, 28 Tenn., 447, 11 Ins. L. J., 215; *Foster vs. Gile*, 50 Wis., 603; *Wright vs. Ry. & P. F. C. M. A. & B. A.*, 96 Ill., 309; *Union Mt. Ins. Co. vs. Stephens*, 16 Chic. Leg. News, 127; *Supreme Council vs. Priest*, 46 Mich., 429.

JAMES G. PAYNE and HINE & THOMAS for Mary E. Perkins:

1. The Masonic Mutual Relief Association is an insurance company, and is engaged in the insurance business.

"There are certain organizations," says Mr. May in his book on insurance (2d ed., § 550 a), "prevalent in this country and elsewhere, under the name of relief, benefit or benevolent societies, or some similar name which generally have for their objects aid to their members, or to their widows and children after the decease of their respective members, and in some cases having both objects. These associations, though not speculative and not based upon capital paid in as investment, have nevertheless a general purpose of mutual protection, resorting to assessments for

the procurement of funds to discharge the mutual obligations of members, and are governed by by-laws which limit and define their obligations. Their certificates of membership often resemble, both in form and substance, ordinary policies of life insurance; and the courts have, with great uniformity, treated them as substantially life insurance companies, applying to them, and to the mutual relations of the members, the rules and principles applicable to the contract of life insurance." *Commonwealth vs. Wetherbee*, 106 Mass., 149; *State, ex rel., vs. Citizens, &c., Associations*, 6 Mo. App., 163.

2. Neither the insured, during his life, or his next of kin, after his death, can have any claim to the insurance money, where in the policy it is expressed to be for some one else.

"If the policy, when issued, expressly designates a person as entitled to receive the insurance money, such designation is conclusive, unless some question arises as to the rights of the creditors of the person who paid the premiums and procured the insurance." *Bliss on Life Ins.* (2d ed.), 316.

"We apprehend the general rule to be, that the policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as beneficiary or beneficiaries; and that there is no power in the person procuring the insurance, by any act of his, by deed or by wills, to transfer to any other person the interest of the person named. An irrevocable trust is created. The person designated in the policy is the proper person to receipt for, and to sue for the money. The legal representatives of the insured have no claim upon the money and cannot maintain an action therefor, if it is expressed to be for some one else. *Id.*, § 318.

Where the policy designates a person to whom the insurance money is to be paid, the person who procures the insurance, and who continues to pay the premiums, has no authority by will or deed to change the designation or title to the moneys. He is under no obligation to pay the premiums unless he has covenanted so to do, but if he does

so, the person originally designated in the policies will derive the benefit. The change of designation can be made only by the person originally, and therefore all such persons must concur in the change." *Id.*, § 337; *May on Ins.* (2d ed.), § 392; *Ky. Mas. Mut. Life Ins. Co. vs. Miller's Adm'r*, 13 *Bush.*, 489; *Gashings vs. Caldwell*, 7 *Rep. (Tenn.)*, 410; *Robinson vs. Duvall*, 12 *Rep. (Ky.)*, 466; *Ricker vs. Charter Oak L. Ins. Co.*, 27 *Minn.*, 193.

But it is needless to multiply references to cases on this point.

3. While it is true the contract in this case differs from the ordinary contract of life insurance, in this, that it gives the assured the power of changing the beneficiary, he has, nevertheless, no *interest* in the "benefits." He has only a *power* to appoint a person who is to receive them, and he must exercise that power in the manner prescribed by the by-laws of the corporation.

His failure to exercise that power in accordance with the by-laws of the corporation, leaves the contract on the same footing as a contract of life insurance in the usual or common form. *Maryland Mut. Society, &c., vs. Clendennin*, 44 *Md.*, 429; *Arthur et al. vs. Odd Fellows' Benf. Asso.*, 29 *O. St.*, 557 (1876); *Duvall vs. Goodson*, 9 *Ins. L. J.*, 901 (*Ky.*) [1880]; *Ky. Mas. Mut. L. Ins. Co. vs. Miller's Adm'rs*, 13 *Bush.*, 494 (1877); *Folmer's Appeal*, 87 *Pa. St.*, 133 (1878).

4. When George H. Hopkins became insured in the Masonic Mutual Relief Association, he became a member of the association, and was bound by its constitution and by-laws, though they were not recited in the policy. One of those by-laws was that there should be "no change of beneficiary" without the approval of the directors of the association. (Art. VI, sec. 4.) "It is not within the power of the company," says the court in *Duvall vs. Goodson*, *supra*, "or the members, or both, to alter the rights of those who by the charter are declared to be the beneficiaries, except in the mode and to the extent therein indicated." In that case Crofoot, at the time of his death held a certificate of membership in the Kentucky Masonic Insurance Company

an association for mutual relief, substantially like our Masonic Mutual Relief Association. The stipulation in the certificate in the Kentucky case was to pay to said Crofoot's daughters, Anna and Lou May Crofoot, or his assigns, *or as he may direct by will*.

5. Again, Miss Hopkins, in her answer says, "her brother's love and affection for her was very great; that he sympathized deeply with her, because he thought her father, while living, had not been as liberal with her as he had with the rest of the children (especially with himself), and therefore he proposed to effect said insurance for her benefit, with a view, as he expressed it, of putting her, in the event of his death, on an equal footing as near as he could, with her brothers and sisters. After the deceased had thus spoken, he applied for membership in said association, and was accepted, of which he at once informed her and delivered said certificate to her, which she accepted." This is not denied. It may well be questioned, then, whether the assured, Miss Hopkins, had not acquired such a vested right on said insurance as to put it beyond the power of the insured to deprive her of it. It does seem to us that even on this the appellant is entitled to the proceeds of the certificate in controversy.

Mr. Justice JAMES delivered the opinion of the court.

The testator, George N. Hopkins, was a member of the Masonic Mutual Relief Association. In his application for membership, he designated his sister, Mary E. Hopkins, as the beneficiary, in the following words:

"I direct that in case of my decease while a member of the above-named association, all moneys to which I may be entitled as such member shall be paid to my sister, Mary E. Hopkins, unless I should hereafter otherwise direct."

Subsequently he made a will, naming his illegitimate child as the beneficiary. It appears that one of the by-laws of the association provided that "no change of beneficiary can be made or recognized until submitted to and approved by the board of directors."

naming of this illegitimate child as his beneficiary made without such previous consent, and it has been held on the part of Mary E. Hopkins that this attempt to change the beneficiary was invalid because forbidden by the laws, unless done with the consent of the company, and consent it was admitted was not obtained; that consequently Mary E. Hopkins remains the only person designated to take this money.

The executor, who appears to have sued in his title of executor, but who really was the trustee, sets up these facts. Mary E. Hopkins, who seems to have intended to claim the money, merely filed an answer asserting that for want of a subsequent valid designation, she was the beneficiary entitled to the money, but she rather singularly winds up her answer by praying hence to be dismissed.

The company reply that they have no interest in the money, and are ready to pay it to whomsoever the court directs it to be paid. The decree below was that the company should pay the fund to the plaintiff, saying nothing of Mary E. Hopkins, but, in effect, that was a decree against her, and she brings the case here on appeal. The association took no appeal, so that the case is here simply on appeal of Miss Hopkins.

One of the questions raised was whether she could bring the case before us. In an ordinary case of a decree against joint defendants, one of them cannot separately appeal, but the Supreme Court has heretofore decided in a number of cases. But this is not a case of that character. The decree is virtually a decree in favor of this executor, and against this appellant. They were the contesting parties, when the decree said that the association should pay the plaintiff, it was really a decree against her. So that we think the case is properly here for review.

The validity of this new designation is, therefore, presented as a question for the determination of the court. A full discussion of the law of the case was made by the court, but we think we can dispose of the matter very simply upon one principle. The power of the association

to make by-laws was limited by the charter itself to such by-laws as should not be in violation of the laws and Constitution of the United States. And this would have been the case even had it not been provided for in the charter. Now, one of the laws of the United States is this very charter, the second section of which provides that "the particular business and objects of such society or corporation shall be to provide and maintain a fund for the benefit of the widow, orphans, heirs, assigns or *legatees* of a deceased member, immediately upon proof of such decease." That provision recognizes fully and completely the right of a member of the association to designate the beneficiary by his will. And that power cannot be cut off or diminished by a by-law. So far, then, as this by-law attempts to do so, it is itself inoperative.

It may be observed that the power of the association to make by-laws seems to be somewhat restricted, and at any rate hardly to reach this subject, for while the fourth section of the charter declares that "the directors shall have full power to make and prescribe such by-laws, rules and regulations as they shall deem needful and proper for the disposition and management of the funds, property and effects of the society," it does not go so far as to say that they may regulate the manner in which beneficiaries are to be designated. In making this by-law, then, the association seems to have gone beyond its power, and if its effect is to prevent a party from freely designating by his will the legatee of his benefits as a member of the association, it is in conflict with the second section of the charter, which is, as we have said, a statute of the United States. We must, therefore, give effect to the recognition contained in that statute of the power to make a bequest, and we cannot cut it down by any construction that we might give to this by-law.

The opinion of the court, therefore, is that this bequest was a valid one, and the decree below is affirmed.

AMORETT CLARK vs. THE DISTRICT OF COLUMBIA.

LAW. No. 22,903.

{ Decided February 11, 1884.
 { The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. The District of Columbia, notwithstanding its non-representative form of government, is liable to an individual for any accident resulting from its failure to keep the streets and highways in such a condition as will render them safe for public use (following Barnes' case, 91 U. S., 540). But this liability is no greater and no less than that of any municipal corporation which receives its grant of power from the sovereign.
2. The District is not required to keep the streets clear of the millions of tons of snow falling upon them during the winter; such an undertaking would be incapable of performance, but if it have actual notice of the dangerous condition of any particular place, from the accumulation of snow and ice, and neglect to remedy it, it becomes liable for consequent injuries.
3. It had been alternately snowing and raining for several days prior to the day when the plaintiff slipped and fell by reason of the accumulated snow and ice upon the street crossing. The streets, in consequence of the protracted storm, were all in a perilous condition for travel, but there was no proof that the District had any more notice of the unsafe condition of the street at the point where the accident occurred than at any other point; or any other notice than such as arises from the well known result to the streets everywhere of a severe and protracted snow storm.

Held, That this was not such notice as would render the District liable.

STATEMENT OF THE CASE.

MOTION for a new trial on exceptions.

The action was brought to recover damages for an injury sustained by the plaintiff in consequence of the alleged negligence of the defendant in not preventing or removing an accumulation of ice and snow on the footway and crossing at the intersection of Seventh street with Pennsylvania avenue northwest, in the city of Washington, where passengers are compelled to pass for the purpose of getting into and alighting from the street cars. There was no dispute that the ice and snow had accumulated on the footway and crossing, to the great inconvenience and even danger of persons passing, and that the plaintiff, who was a widow about sixty years of age, fell and seriously injured herself for life by breaking her hip while going to the street car. It was in evidence, that it began to snow at 11 a. m., on the

20th day of December, and snowed continuously until 3 p. m., of the next day; that it again began snowing on the 23d at 11 p. m., and continued until 3 p. m. of the 24th; and that it began to rain on the 25th at 2 p. m., and continued until 11 p. m., of said day. The accident occurred on the 25th, at about 6 p. m. The jury found for the plaintiff, and assessed the damages at \$4,500. The points made by counsel, and the exceptions taken, appear in the extracts from their briefs given below.

THEODORE H. N. MCPHERSON for plaintiff:

I. The defendant requested the court to instruct the jury that—

“The District of Columbia, under the form of government existing at the time of the accident which is the subject-matter of this suit, is not liable for damages resulting from said accident.”

This instruction was rightfully rejected by the court.

The act of February 21, 1871, created a corporation for municipal purposes, called “The District of Columbia.”

The 37th section of this act provides that “There shall be in the District a Board of Public Works.”

The same section further provides that the Board of Public Works shall have entire control of and make all regulations which they shall deem necessary for keeping in repair the streets, avenues, &c.

By section 2 of the act of June 20, 1874, the President is authorized to appoint three commissioners, who shall exercise all the power and authority lawfully vested in the Governor or Board of Public Works of the said District, except as hereinafter limited, and shall be subject to all the restrictions and limitations now imposed by law; that is, by the act of February 21, 1871 (18 Stat., 116).

Section 3 of the said act confers the same power and authority on the Commissioners which was imposed by the act of February 21, 1871, on the Governor or Board of Public Works, in respect to keeping in repair the streets, avenues, &c., of the city.

And by the act of June 11, 1878, the power and authority imposed upon the Commissioners by the act of June 20, 1874, in respect to keeping in repairs the streets, avenues, &c., of the city, was continued in full force and effect. 20 Stats., 102.

By the force of these provisions of positive law (acts Feb. 21, 1871, June 20, 1874, and June 11, 1878), the defendant became the successor of the old corporation, and is responsible in this action. Barnes' Case, 91 U. S., 540; 1 Dillon Municipal Corp., sec. 385; Hayden *vs.* Madison, 7 Greenl., 76; Abbott *vs.* Herman, *Id.*, 118.

There being no doubt of the obligation of the District to keep the streets, avenues, &c., in repair, it is entirely immaterial whether the duties imposed upon the municipality are performed by agents elected by the people or appointed by the President, and it is equally immaterial whether such agents were called a Board of Public Works or a Board of Commissioners. Barnes' Case, 91 U. S., 545.

This cause of action accrued to the plaintiff December, 1880, after the abolition of the cities of Washington and Georgetown, and the creation of the corporation of the defendant.

In the case of the District of Columbia *vs.* Cluss, the Supreme Court held that the corporation which the act of February 21, 1871. ch. 62 (16 Stats., 419), created by the name of the District of Columbia, succeeded to the property and *liabilities* of the corporations which were thereby abolished. 103 U. S., 705.

A change in the charter of a municipal corporation, in whole or in part, by an amendment of its provisions, or the substitution of a new charter in place of the old, embracing substantially the same corporations and the same territory, will not be deemed, in the absence of express legislative declaration otherwise, to affect the identity of the corporation, or to relieve it from its previous liabilities, although different powers are possessed under the amended or new charter, and different officers administer its affairs. Brough-

ton *vs.* Pensacola, 93 U. S., 266; Milnee *vs.* Pensacola, 2 Wood, 632.

II. It is too well settled to admit of a doubt that a municipal corporation is liable for damages occasioned by the accumulation of snow and ice on the streets, footways and crossings, so as to endanger the public walking over the same. *Baltimore vs. Marriott*, 9 Md., 160; *Collins vs. Council Bluff*, 32 Iowa, 324; *Providence vs. Clapp*, 17 How., 165; *Luther vs. Worcester*, 97 Mass., 269; *McLaughlin vs. Cory*, 77 Pa. St., 109, 113; *Chicago vs. Robbins*, 2 Black., 418; *Nebraska vs. Campbell, Id.*, 590.

And that this liability extends to the corporation of the District of Columbia. *Barnes vs. District of Columbia*, 91 U. S., 540; *Weightman vs. Washington*, 1 Black., 39.

Snow and ice deposited from any cause in a rough, uneven condition, so that its slipperiness becomes more dangerous than if it lay on a smooth surface, then it is generally held to constitute a defect or obstruction which the municipal corporation must remove or pay any resulting damages. 2 *Thompson Neg.*, 785; *Luther vs. Worcester*, 97 Mass., 269, 272, and note; *Street vs. Holyoke*, 105 *Id.*, 82, 84-85; *Billings vs. Worcester*, 102 *Id.*, 329; *Pinkham vs. Topfield*, 104 *Id.*, 78; *Fitzgerald vs. Wobum*, 109 *Id.*, 204; *McAuley vs. Boston*, 113 *Id.*, 503, 506, and note; *Cook vs. Milwaukee*, 24 Wis., 274; *Shea vs. Lowell*, 8 Allen, 136; *Byrn vs. Lowell*, 10 *Id.*, 147; 77 Pa. St., 109; 32 Iowa, 324.

The mere existence of the obstruction or defect is evidence of the neglect of corporate duty. *Sher. & Red. Neg.*, sec. 148; *Requa vs. Rochester*, 45 N. Y., 129; *Davenport vs. Ruckman*, 10 Bos., 20, affirmed; 37 N. Y., 568; *Walker vs. Lockport*, 43 How. 36; *Holt vs. Penobscot*, 56 Maine, 15.

III. As to *notice*. Municipal authorities are called upon to observe, notice, and see that the public streets in time of winter are reasonably clear of ice and snow. 2 *Thomp. Neg.*, 785; *Todd vs. Troy*, 61 N. Y., 506, affirmed; *Mosy vs. Troy*, 61 Barb., 580.

When such defect or obstruction is *notorious*, or has continued undisturbed for a time sufficient to charge the *public*

authorities with constructive notice, the corporation is liable. *Todd vs. Troy*, 61 N. Y., 507-9; *Reed vs. Northfield*, 13 Pick., 98; *Mayor vs. Sheffield*, 4 Wall., 189; 36 Barb., 226; 4 Kent, 172.

The liability of the city for the defect in the sidewalk was the same whether the officials knew it or not. *Sher. & Red. Neg.*, secs. 147, 148, 385, 407, note; *Erie vs. Schumgle*, 10 Howe's Pa., 384; *Norristown vs. Mayer*, 17 P. F. Smith, 356.

Lapse of time at common law supplies notice, for, after reasonable time has elapsed, it is negligence on the part of the corporation not to know of the defect when patent; for which negligence suit lies. *Wharton Law of Neg.*, sec. 963; *Howe vs. Barkshoof*, 44 N. Y., 113; *Manchester vs. City of Hartford*, 30 Conn., 118; *Requa vs. Rochester*, 45 N. Y., 129; *Holt vs. Penobscot*, 56 Me., 15; *Colby vs. Westbrook*, 57 *Id.*, 81.

A. G. RIDDLE and FRANCIS MILLER for the District:

Our position is stated in the following propositions, denied by the court below:

1. The present form of government of the District of Columbia, consisting as it does of officers who are all appointed and paid by the United States, without any power to levy taxes or to spend money except as directed by Congress, is not of such a character as to make the District responsible in damages for any negligence of those officers.

2. The present government of the District of Columbia having been imposed upon the people of the District, without any power or opportunity on the part of said people to accept or reject the same, the District cannot be held responsible for the negligence of said government.

3. If the care of the streets of the city of Washington, as a public duty, is imposed by the statute upon the District of Columbia, the performance of which is for the general benefit, and the District derives no profit from it, then no action can be maintained against the District for damages resulting from a neglect to perform such public duty.

It will not be claimed that there is any statute conferring the right of action in this case; nor can it be claimed, by virtue of any statute or otherwise, that the District derives any revenue from the use of its streets and highways.

The contention must be, that the right of action arises by implication; that it is the result of powers and duties imposed upon the District by statute.

We are mindful of the Barnes case (96 U. S., 540). As that decision was by a bare majority of the court, it is our purpose to ask the court which made it to review it in a case properly prepared. For the present, we observe that the political status of the people of the District has been so materially changed since that decision that it seems proper to make the point that the Barnes case is not authority in this case.

The cause of action in that case arose at a time when the District was a real as well as a legal municipality, armed with a full equipment of powers, legislative and executive. The people had so large a share in the legislative that no liability could be incurred, and no tax levied without their assent. The real basis of their liability in that case must, when reached, be understood to be this exercise of political power as a consideration. Shadowy and vague as that is, there must be the assumption of something on which to rest this liability, or it cannot exist. The status of the people is now totally changed.

It is true the act of June 11, 1878, ironically declares that although the people of the District had not been in possession of a political right or franchise, or vestige of corporate power for four years, "the District of Columbia shall remain and continue a municipal corporation!"

It is competent for Congress to declare that the District shall remain a corporation, and under that fiction govern the District. It is not within its power to create a corporation without corporators, and when it is stated that there are no corporators, that is the end of the argument, and the end of authority applicable to corporations. A municipal corporation must not only have corporators, the resident

Citizens, but they, as such, must be in possession of corporate franchises, with the means and power for their due exercise. A municipal corporation has a common council and board of aldermen, or some body which answers to the legal idea of such a legislative agency, a body which owes its personnel to the choice of the corporators. There is no extant legislative body of the District. A municipal corporation under our system has a mayor, designated by the corporators. The District has no such officer, has no executive in any way designated by any corporator or citizen, or inhabitant of the District, nor does the executive government of the District, save in a remote degree, answer to the idea of a mayor.

As Congress has not given a right of action against this, its continuing municipal corporation for the alleged cause of action counted upon in this case, and as the people of the District can exercise no power in the premises, how can a right of action be implied from any power or duty imposed upon them in the premises? It never was by anyone anywhere contended that a people, town, hamlet, or hundred, who had no power over, no special interest in a street, highway or bridge, within the limits of the territory they inhabit, or the town covers, was liable for an injury in a civil action caused by a defect in the public works. How can a people, property owners, by any fiction of law, be held responsible for the defects in a street, highway or bridge, over which it is admitted that not even a fiction of law gives them a fiction of power? As covering this point, and largely and luminously the whole field of municipal liability for torts of the character charged in this case, we cite *Hill v. Boston*, 122 Mass., 344; 2d Thomp. Mg., 540.

What is the measure of liability by the District, for the presence of snow and ice upon the streets, as proved in this case? Whatever may be said of sidewalks, the *locus* of the accident was on the surface of two streets—the carriage-ways in common—and it is nonsense to talk of a sidewalk as entering into this already complex idea.

No reach of science or prescience enables men with any certainty to foretell a snowstorm, its duration, or depth of

fall. So rarely in this latitude has obstruction to streets arisen from that cause, that beyond providing for the removal of snow from the sidewalks proper, there is no provision of law upon the subject. Webb, 163, sec. 18; *Id.*, 220, sec. 23.

It will be observed, that while this last might, perhaps, be held to require a clearing of the crossings on the north side of Pennsylvania avenue, by the Commissioners of Improvements, from First to Fifteenth streets, it is in terms limited to that side.

To aid the court and jury to appreciate the conditions under which it was sought to hold the District responsible for the accident to the plaintiff, it gave in evidence a duly certified copy, under the seal of the War Department of the United States Government, under date of January 9, 1882, of observation of the Signal Service of the United States Army, in Washington, D. C., and read so much therefrom as to show that it began to snow at 11 a. m., on the 20th day of December, 1880, and snowed continuously in said city of Washington until 3 p. m., on the 21st day of December, 1880; that said record further showed that it again began snowing on the 23d day of December, 1880, at 11 p. m., and continued until the 24th day of December, 1880, at 3 p. m.; and that it began to rain on the 25th day of December, 1880, at 2 p. m., and continued until 11 p. m. of said day.

From the records of the Signal Office it was shown in evidence, that the city was visited by a long-continued snow-storm, or a series of succeeding storms of unexampled severity in this latitude, continuing from Monday to near nightfall of Friday, followed by a rain storm on Saturday, the day of the accident; and it is said that the District is to be held responsible for the condition of the streets of the city, not for the safety of carriages, but for the foot passengers at the crossings. It has not a man to detail for the duty of clearing them, nor a dollar at its command for this purpose.

There were several hundred intersections of streets in the city of Washington alone, an hundred as important as that

mentioned in the declaration. To hold that the District should have had this intersection clear at the time, is to hold it responsible for the impossible.

It is submitted that it would be the only sound and practicable rule to hold that persons who go forth under the conditions attending the plaintiff's journey, described in the declaration, must do so at their peril. Otherwise, every accident will lay a heavy burden upon the District. It will always be at the discretion of the plaintiff. It will never be present with observing witnesses to prove its side.

Mr. Chief Justice CARTER delivered the opinion of the Court.

The plaintiff, who is a widow and of advanced age, brings this suit to recover damages in consequence of injuries sustained through the alleged default of the defendant in allowing the snow and ice to accumulate on the footway and crossing at the corner of Seventh street and Pennsylvania avenue, in this city. It appears that she was a passenger on one of the street cars, and that at this point the passengers are transferred from one car to another; that she got off the car, and while going to the other, she slipped and fell, breaking her hip-bone, and became thereby seriously crippled for life. The jury found in her favor, and assessed the damages at \$4,500, which is not a large verdict, considering the nature of her injuries, provided under the law and facts of the case she is entitled to recover anything.

Three primal objections to the verdict are urged by the defendant: First. "That the present form of government of the District of Columbia, consisting as it does of officers who are appointed and paid by the United States, without any power to levy taxes or to spend money, except as directed by Congress, is not of such a character as to make the District responsible in damages for any negligence of those officers." Second. "That the present form of the government of the District of Columbia, having been imposed upon the people of the District, without any power or opportunity

on their part to accept or reject the same, the District cannot be held responsible for the negligence of such government;" and, Third. "That the care of the streets of this city is imposed by statute upon the District, the performance of which is for the general benefit, and that the District derives no profit from it; consequently, no action can be maintained against the District for damages resulting from a neglect to perform such public duty."

These questions, however interesting they might be to discuss, have been already considered and decided by the Supreme Court of the United States in the case of *Barnes vs. The District of Columbia*, 91 U. S., 540, where it was held that the liability of the District is not affected by the manner in which its officers are placed in their position; whether elected by the people or appointed by the President. It is useless, therefore, to enter into any further inquiry upon the subject, since we are bound by the authority of that decision which, although it was rendered by a divided court, must remain the law with us until reversed by the same court which rendered it. We are of opinion, therefore, that the District is liable if it fail to keep the streets and highways in such a condition as will render them safe for public use. But this liability is no greater and no less than that of any municipal corporation which receives its grant of power from the sovereign.

The testimony in this case is, that it had been alternately snowing and raining, with short periods of intermission, three days prior to the accident, and that it was raining at the time of the accident, and for several hours prior to and including the time when it occurred. All the streets of the city were covered with a slush of mud and snow and ice. There is no evidence that the condition of this particular street was any worse than that of any other of the hundreds of streets in the city. Now, it certainly cannot be maintained that the District authorities are called upon to keep all these streets clear of the millions of tons of snow falling upon them during the winter. Such an undertaking would be incapable of performance, and is simply impossible.

It never has been done, and never can be done. The most that can be said is, that the District is to be held to liability when, on notice of the dangerous condition of any particular place, it neglects to remedy it. It is not contended that there was any actual notice given the authorities in this instance, but it is claimed that the known fact of the state of the weather, and of its having snowed so continuously, is to be construed as notice. Well, that would apply to every street and crossing of the city, and would affect the plaintiff as much as the defendant. Everyone knows that it is dangerous to travel on the streets at such a season and in such weather, and the responsibility must rest with the citizen who runs the risk of slipping and falling, if he goes out at such a time, unless he can show that the city authorities had something more in the shape of notice of the dangerous character of the place where he was injured, than that notice which everyone has at such a time. What other notice did the District, through its agents, have? It knew, of course, that it had been snowing and raining, and thawing and freezing for days, and that travel on the streets everywhere was dangerous. But there is not a particle of proof that there was any more notice of a perilous condition of the street at this point than at any other point. Now, we do not believe that a municipal corporation can be held liable when it has had no more notice than that which arises from the well-known result to the streets everywhere of a severe and protracted snow storm. The case was tried upon this theory of constructive notice, and the judgment must, therefore, be reversed, and a new trial granted, in order that the plaintiff may, if she can, charge the District with such notice of the dangerous condition of the locality of this accident as the law requires under the circumstances of this case, and as we have intimated.

HARRIS BROS. *vs.* O. DAMMANN.

LAW. No. 24,176.

{ Decided February, 1884.
{ The CHIEF JUSTICE and JUSTICES COX and JAMES sitting.

Under the statute of 8 Anne, ch. 45, as modified by the landlord and tenant act (R. S. D. C., § 678) where execution is levied on goods situated on premises of which the execution debtor is tenant, the landlord has a prior lien for the rent in arrear, and, if the levy is made *after* a periodical instalment of rent has begun to accrue, for the whole of that period also, but no more, although the marshal, instead of taking the goods to the pound, kept them upon the premises for a longer period.

THE CASE is stated in the opinion.

N. H. MILLER for plaintiff.

A. B. DUVAL for defendant.

Mr. Justice COX delivered the opinion of the court.

Judgment was rendered for the plaintiff below, and execution levied upon goods in the defendant's store. The landlord of the premises, Meyer Silver, made application to the court below, by motion, to direct the marshal to apply \$100 of the proceeds of the sale of the goods to the payment of rent for the month of March, 1883. An order was made as prayed, and an appeal taken from that order by the execution creditor.

The circumstances that are material to the question are as follows: As far back as the 6th of February, 1883, Michael Holtzman, who had a judgment against the same defendant, caused an execution to be issued, and that was levied on that day upon the same goods. The goods were not removed from the premises, but the marshal continued in possession of the goods there until the 1st of March, 1883, when Silver, the landlord, caused an attachment to be issued for the rent due for January and February, and levied on the same goods. The marshal continued in the possession of the goods on the premises until the 15th of March. Meanwhile, on the 8th of March, the plaintiffs in this suit caused an execution to be issued on their judgment, and

levied on the goods. On the 15th of March the marshal removed the goods and sold them, and paid to the landlord the rent for the months of January and February out of the proceeds of the sale, and applied part of the proceeds to the first execution. Then he applied all the balance of the proceeds in his hands to the second execution—that of Harris Bros.—except \$100, which he retained, upon notice from the landlord, Silver, to meet the claim of the landlord for the rent for the month of March. The question now is, whether the landlord is entitled to the rent for the month of March, because the marshal remained there until the 15th of that month.

We should observe, that the petition of Silver states that the marshal made sale of these goods under the two executions issued on the judgments of Holtzman and Harris Bros., and from that petition we have to assume that both these writs were levied upon the same goods. There is some question made about that, but, for the present, we assume that to be the fact.

In the first place, what was the condition of the law on this subject, before the passage of our landlord and tenant act?

At common law, as we all know, the landlord had simply a right to distrain his tenant's goods, on the premises, for his rent, *after it was due*; and if in the meanwhile, and before the rent was due, a judgment creditor issued an execution and levied upon the same goods, the landlord had no priority over him. The statute of 8 Anne, chap. 45, provided that wherever execution was levied upon the goods of the tenant on the premises, the judgment creditor should be bound to pay to the landlord the rent due at the time of the levy to the extent of one year's rent, and the sheriff might include this in his levy against the tenant. When such a levy was made, after a periodical instalment of rent had begun to accrue, the question arose whether the landlord would be entitled to be paid, out of the proceeds of the sale, the amount of the rent for the whole period. The authorities seem to settle it, pretty conclusively, that that can-

not be done: that the landlord had no relief under the act of Anne to that extent. So far as American cases are concerned, it was first settled in the case of *Trappan vs. Morie*, 15 Johns., 1, that the landlord could only apply to have the rent actually due to him and in arrears at the time the levy was made. The same point was settled in Maryland in the case of *Washington vs. Williamson*, 23 Md., 244, where the sheriff levied in the month of July, and the court allowed payment to be made up to the 1st of July for the rent accrued up to that time, and overruled the order of the court below allowing rent to be paid for the month of July. It must, therefore, be held to be settled law that where, at the time of the levy, a periodical instalment of rent has not accrued, but is accruing, the landlord is not entitled to that instalment under the statute of Anne. I should observe that the application in this case was made for relief under this very statute, because it is in force in Maryland and in the District of Columbia.

Another thing seems to have been settled, and that is, that if the sheriff, after making this levy upon personal property, continues in possession on the premises for a certain time, the landlord is not entitled to relief, under this act of Anne, for rent accruing during the period while the sheriff is on the premises. That, no doubt, is on the theory that the sheriff is there simply as an officer of the law, is not the tenant of the landlord, but the goods are in the custody of the law; that the sheriff, in fact, is only making use of the premises as his pound: that, in contemplation of the statute of 8 Anne, the goods are not in his possession as tenant, or in the possession of the tenant. The law on that subject is stated in *Alexander's Statutes*, p. 685, as follows:

"But he [the landlord] cannot claim except for rent in arrear at the time of issuing the execution, and is not entitled to what accrues during the sheriff's possession; if the latter injure him by remaining too long in possession, the landlord may have his remedy by an action on the case. *Hoskins vs. Knight*, 1 M. & S., 245; *Washington vs. Williamson*, 23 Md., 244. The sheriff, too, is not liable where

He takes corn in the blade and sells it before any rent is due, to account to the defendant's landlord for rent accruing subsequently to the levy and sale, though notice had been given, and the corn not removed until long afterwards when rent has accrued. *Gwilliam vs. Barker*, 1 Price, 274. But the *dictum* of Thomson, C. B., there, that the landlord's remedy in such a case was by distress, was overruled in *Peacock vs. Purvis*, 2 Brod. & Bing., 362, and *Wharton vs. Naylor*, 12 Q. B., 673, denying like *dicta* in *Smallman vs. Pollard*, 6 Man. & G., 1001; goods so taken being, until removal, *in custodia legis*, and equally so whether in the hands of the sheriff or his vendee, and the removal without payment of the rent, though wrongful, and subjecting the sheriff to an action, not invalidating the execution."

We may, then, assume that where a levy was made, as in the present case, in the midst of a month or quarter, the rent can only be recovered under the statute of Anne, up to the expiration of the preceding month or quarter, and no rent accrues for the purpose of being satisfied out of the proceeds of sale, for the time during which the sheriff was rightfully or wrongfully on the premises.

The next question is, how far this condition of the law is changed by our landlord and tenant act. That provides that the landlord shall have a tacit lien upon such personal chattels on the premises as are subject to execution, to commence with the tenancy, &c.

Where the tenancy is from month to month, and one month has commenced, we may assume that the landlord's lien for the rent of that month commences with the month. It commences before the rent is due, and will have priority over a lien acquired by execution issued during the month. We have gone to the extent of holding that under the statute of Anne, *as modified by our statute*, the landlord, in such case, is entitled to the whole of the accruing month's rent. That was settled in *Joyce vs. Wilkenning*, 1 Mac Arthur, 567, and also in *Gibson vs. Gautier*, 1 Mackey, 35. That is the extent to which this court has gone. We have not held that the lien of the landlord would entitle him

to any further relief than for the accruing rent—that the periodical rent accruing at the time that the levy made. If we should go any further, and hold that the rent which accrued for the next period afterwards should be paid, there would be no limit in time in cases of leases running for a term of years.

We should have to hold that, at the commencement of the term the landlord's lien attached for the rent of the whole term, giving him a preference for the whole over an execution creditor who levied pending the term. This would effectually cover up the tenant's property from his other creditors. That idea was distinctly repudiated in the case of *Joyce vs. Wilkenning*, in *1 Mac Arthur*.

To apply the law, as thus defined, to the facts of this case. We find that, on the 6th of February, execution was levied at the instance of Holtzman, on these goods; that the marshal continued to hold them on the premises until the 15th of March. At the time of the levy, the whole rent for the month of January was due, and that the landlord was clearly entitled to, under the very words of the statute of Anne. Under our interpretation of our own statute, the landlord was entitled to receive the rent for February out of the proceeds. So that the rent for those two months of January and February was properly paid to him. But before the rent for the month of March had begun to accrue at all, the goods had passed out of the tenant's possession into the custody of the law, and were held by the marshal. Under the terms of the statute of Anne, there could be no application of the proceeds of sale under that execution, to the payment of rent for the month of March; neither could the landlord claim for the rent accruing during the sheriff's occupancy of the premises, according to the decisions I have already referred to.

Further, the lien of the landlord is confined to the tenant's personal chattels on the premises. Physically these chattels were on the premises, but were they so in contemplation of law? When the marshal levied his execution, the goods passed into the custody of the law. The regular course of

proceeding was for the marshal to remove them to some auction room as his pound, but on the request of the tenant himself, and by consent of the parties, the goods were allowed to stay on the premises for the time being, and thus the premises became the marshal's pound. The goods were not in possession of the marshal as tenant of the landlord, but they were there in the marshal's pound. It does not seem to us, therefore, that if these executions were levied on the same goods, the landlord had any claim upon them for the rent for the month of March; and that being the condition of things, which we must assume from the petition in this case, we think that the order below was erroneous. Some doubt is cast upon the question whether these executions were both levied on the same goods, one schedule being larger than the other. It is impossible for us to determine whether the goods were the same or not, and we, therefore, think that the order overruling the order below ought to be made without prejudice to the right of the party to show that these two executions were levied on different goods. If the levy of March 8th was made on different goods from those already in the marshal's hands under the previous levy, it would follow, from the views we have expressed, that the rent of March ought to be paid out of their proceeds.

HORACE S. JOHNSTON

vs.

THE DISTRICT OF COLUMBIA and THE FIRST NATIONAL BANK OF
NEW YORK.

EQUITY. No. 7809.

{ Decided December 10, 1883.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

It was entirely within the discretion of the Board of Public Works to determine upon the width of pavements to be laid under the acts authorizing special improvements and assessments therefor.

THE CASE is stated in the opinion.

JOHN E. NORRIS and ROBERT CHRISTY for plaintiff.

RIDDLE & MILLER for defendant.

Mr. Justice JAMES delivered the opinion of the court.

The plaintiff, Johnston, is the owner of certain lots in this city, on Twenty-sixth street, between Pennsylvania avenue and M street, lying in such a way that they abut, not only on Twenty-sixth street, but on Pennsylvania avenue and on M street.

In August, 1877, contracts were made between the Board of Public Works and the Manhattan Paving Co. of New York, whereby the latter was to put down on Twenty-sixth street, and on M street, in front of these lots, a carriageway, and a curbing and pavement, or footway. On Twenty-sixth street there is a high bank of rock, which, curving outwardly towards the center of the street, embraces two or three of these lots facing on Twenty-sixth street.

A pavement and footway were laid, and assessments were made for the work, and thereafter certificates of indebtedness for unpaid assessments were issued against the lots. It appears that these certificates were purchased by the defendant, The First National Bank of New York, who, it is alleged, is attempting to enforce their collection by advertisement and sale of the property. The plaintiff prays that the bank be enjoined from this, because, as is alleged in the bill, the pavement on Twenty-sixth street and on M street

being of the ordinary width of eleven or twelve feet, including six inches for curbing, narrowed down to four or five or possibly six feet, in front of this rampart of rocks, and he asserts that until it should be made eleven feet wide (which would involve the cutting away at great expense of this pile of rock), it is an unfinished work, and that no assessment can lawfully be made until it shall be so done.

This claim is based upon the provisions of the act of the legislative assembly, approved August 10, 1871, which provides, "that whenever any of the improvements mentioned or referred to in section thirty-seven of the act entitled 'An act to provide a government for the District of Columbia,' approved the twenty-first day of February, one thousand eight hundred and seventy-one, *shall be completed*, a statement of the cost thereof shall be prepared by the Board of Public Works, and shall be filed in the office thereof, and immediately thereafter an assessment, based upon said statement, shall be made, as provided for in said section of said act, which assessment shall be collected by the said board in the same manner as other taxes of the District of Columbia are now or may hereafter be authorized to be collected."

By the 3d section of this act it is also provided, "that if any person or persons, notified as aforesaid, shall neglect or refuse to pay the amount assessed against his or her property, as aforesaid, after the expiration of thirty days, the said Board of Public Works shall immediately thereafter issue certificates of indebtedness against the property assessed as aforesaid, which certificate shall bear interest, until paid, at the rate of ten per centum per annum, and until paid, the assessment and certificate shall remain and be a lien upon the property on or against which they shall have been issued; and if the said assessment shall not be paid within one year, the said board shall, upon the application of the holder of the certificate of indebtedness, proceed to sell the property against which the assessment and the certificate exist, or so much thereof as may be necessary to pay said assessment."

It appears in the bill itself, and by the testimony, that

after the assessments were made, an officer in charge of the duty of correcting excessive assessments, made reductions in the assessment where the pavement was narrowed; that is to say, although there was an original charge as for a pavement of the ordinary width, the charge was reduced on account of the narrowness necessitated by the existence of this bank of rock. The contract between the Board of Public Works and the paving company, it should be stated, did not specify what was to be the width of the pavement or footway. But the acceptance, without objection, by the board of this pavement, so narrowed, must be taken as virtually conceding to the company that the pavement was to be of this reduced width at that point. The assessment, as corrected, against these lots, was made for their proportion of the cost of this narrowed pavement, and not for a pavement eleven or twelve feet wide. We are of opinion that it was entirely within the discretion of the Board of Public Works to make the pavement of full or narrow width, as it might determine. It is not for us to say how wide it ought to have been, since it has not been shown to us that the law required it to be of any specified width. And knowing the laws of the legislative assembly, we are of opinion that they do not require anything of the sort; the matter was left wholly to the discretion of the Board of Public Works, and if the latter accepted, without objection, this pavement from the paving company in its narrowed state, and assessed the lot owners with that fact in view, we must presume that it was because it had been decided that the pavement should be of this reduced width.

There is no ground for complaint, therefore, even if it had happened that the bank held certificates of indebtedness issued against the lots lying at this narrow point, and were threatening to enforce the collection of them. But it seems, as a matter of fact, that the particular certificates held by The First National Bank are against lots where the pavement is of the full width. So that the payment which is insisted upon is not for an unfinished piece of work.

But whether that be so or not, the principle on which we

rest our decision is, that it was a matter for the Board of Public Works to determine whether a wide pavement or a narrow one was to be laid; that, as a matter of fact, they determined upon a narrow pavement at this point, and that the assessment was consequently for work actually completed.

The bill was dismissed below, and we affirm the decree.

F. L. WILLIAMSON, to the use of David A. Windsor and Da —
vid C. Grayson, trading as WINDSOR & GRAYSON,

vs.

GEORGE HILL, JR.

LAW. No. 22,811.



{ Decided February 25, 1884.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. Where parties agree verbally that the terms of a verbal agreement which they have entered into is to be found as stated in a certain paper, that paper is the proper evidence of the particular matters to which they have agreed; not that the paper is the contract between them, but that it is the best statement of what they have agreed to verbally, and it should, if the contract be a proper one to be enforced, be submitted and read to the jury as the best evidence of what the contract was.
2. Nor is it proper, with the paper thus assented to as the correct statement of the contract, that witnesses should be allowed to state from memory what the contract was, even though in doing so they are allowed to look at the paper to refresh their recollection, for the parties have agreed that the facts and terms of the agreement are to be found in the paper, and that it was to be resorted to as the evidence of their agreement.
3. The erroneous exclusion of evidence is not a good ground for a new trial if the exclusion did not injuriously affect the case of the party excepting.
4. Where a promise to pay the debt of another has for its object the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute. But a promise is not within the statute where the promisor undertakes to pay a debt which is at the same time owing by another, in order to obtain a benefit which he, the promisor, did not before enjoy, and which is to accrue directly to himself. Such a promise is not to pay another person's debt, but to pay what the promisor adopts as his own debt. It is the price which he undertakes to pay for a benefit which he seeks. Nor does it matter that the object sought in making the promise does not turn out to be a benefit to the promisor, it is sufficient that the promisee submits to a sacrifice in behalf of the interest of the promisor, and not for the benefit of the original debtor.

STATEMENT OF THE CASE.

This was an action of assumpsit to recover the sum of \$1,000, alleged to be due under a contract entered into between plaintiff and defendant. On the trial of the cause, the plaintiff offered evidence tending to prove that one William J. Murtagh was the owner in fee simple of a farm in Prince George's county, Maryland, against which there were, on or about February 18, 1879, the following valid and sub-

sisting liens: First, a lien of one Bannon, for about \$5,000. Second, a judgment lien in favor of one Davis, for \$1,000 and interest, which had been by him assigned to and was then owned by the plaintiff. Third, a judgment in favor of the defendant for \$9,300, which had been confessed to him by Murtagh as partial security for the payment of a debt due by Murtagh to Hill, the latter then having as further security for his debt a written assignment to the extent of \$10,500, of a claim which Murtagh held against the District of Columbia for about \$50,000 for advertising done by Murtagh for the District of Columbia.

The plaintiff further offered evidence tending to prove that the real estate in Maryland was, on the day already mentioned, February 18, 1879, advertised for sale under the plaintiff's lien, and that, thereupon, at a meeting between the plaintiff and the defendant, at which Goldsborough, Windsor and Murtagh were present, in consideration of the plaintiff's withdrawal of the property from sale under his lien, the defendant agreed to pay the plaintiff the sum of \$1,000 or so much thereof as might be necessary to satisfy the plaintiff's judgment, with interest and costs, out of the first \$9,400 which might be thereafter received by the defendant on account of the claim assigned to him by Murtagh; also that at the meeting above mentioned, which was held on the same day that the memorandum presently referred to bears date, a memorandum of agreement was reduced to writing, and that the reason for so reducing it to writing was that the defendant declined to sign any contract, and said that his word was as good as his bond, and that a memorandum of the agreement might be made; that this memorandum was then reduced to writing by the plaintiff or his agent for the expressed purpose of perpetuating the terms of the agreement between the plaintiff and the defendant, as such agreement was understood by the plaintiff and by the witnesses; and, further, that the memorandum was then and there read to the defendant in the presence of these witnesses as a correct statement of the terms of the agreement and understanding between the plaintiff and the

defendant, and was assented to by the defendant as read. Thereupon it was signed by the witnesses as witnesses of the fact.

That thereupon the property was withdrawn; that Murtagh, the debtor to all these parties, recovered a judgment on his claim against the District of Columbia, for \$20,640 with interest and costs, of which sum Hill, on the 13th day of July, 1880, received, under and by virtue of the assignment to him, \$10,500, the full amount assigned to him by Murtagh out of his claim; and that he refused to pay the \$1,000 which he is alleged to have agreed to pay. Thereupon the plaintiff offered in evidence the memorandum spoken of above. The court refused to admit it or to allow it to be read to the jury, but said it might be referred to by the witnesses for the purpose of refreshing their memories. The memorandum was as follows:

“Memorandum of Agreement.

“This memorandum of agreement, made and entered into this 18th day of February, 1879, witnesseth, that for and in consideration of the withdrawal for three months time of the sale of the Murtagh farm, now advertised for sale at the court house door, in Upper Marlborough, Prince George’s county, Maryland, by the sheriff of said county, under and by virtue of an execution issued upon a certain judgment against the said W. J. Murtagh, obtained on the law side of the circuit court of the said county, in favor of one Charles T. Davis, and by the said Davis assigned to one F. L. Williamson, Mr. George Hill, jr., of Washington city, has this day agreed to pay to the said F. L. Williamson, or to the sheriff of said county, for the purpose of paying and satisfying said judgment, or of having it assigned to him as he may elect, the sum of \$1,000, or so much thereof as may be necessary to satisfy said judgment, with costs and interest thereupon, out of the first \$9,400 received by him, the said Hill, on account of his assignment of a certain claim of the said Murtagh against the District of Columbia for advertising the delinquent tax lists in the National Republican

in June, 1875; which said assignment of said claim to the said Hill is duly filed in the office of the District Commissioners of said District, and in the records of the Supreme Court of the said District of Columbia, in the case of Murtagh against said District; which said assignment the said Hill has agreed to fully collect as far as he can up to the full amount of his claim thereunder and of the judgment thereupon. This agreement was witnessed and assented to by the parties hereto, in whose presence it was entered into and by whom it was reduced to writing by and with the consent of the said Hill.

“R. H. GOLDSBOROUGH,

“W. J. MURTAGH.

“Witness:

“D. A. WINDSOR.”

The plaintiff then rested, and the defendant having offered testimony in denial of the plaintiff's case, the plaintiff prayed the court to instruct the jury as follows:

“If the jury believe from the evidence that the memorandum of agreement which reads as follows [here follows the memorandum above stated], was reduced to writing, at the time the agreement testified to by the several witnesses for the plaintiff and defendant was entered into, and on the day on which it bears date; and that said memorandum was reduced to writing by the plaintiff or his agent with the purpose, on his part of perpetuating the terms of the agreement between plaintiff and defendant, as such agreement was understood by plaintiff, and that said memorandum of agreement was read to the defendant as and for a correct statement of the terms of the agreement, in the presence of the said witnesses, and the defendant, not dissenting or objecting to the terms of said contract, as expressed in said memorandum, said memorandum was thereupon signed in the presence of plaintiff and defendant by said Goldsborough, Murtagh and Windsor as witnesses.

“And if the jury further believe from the evidence that plaintiff thereupon and thereafter performed all that was

agreed by him to be done under said agreement (as expressed in said memorandum) and that, relying on said agreement, plaintiff withdrew the advertisement of sale of said property, and that the said property was subsequently sold under a lien prior to the plaintiff's for a sum less than the amount of said lien, then the defendant is estopped from denying the terms of the agreement between plaintiff and defendant, as set out in said memorandum of agreement."

The court refusing so to instruct the jury, the plaintiff thereupon prayed the following instruction:

"If the jury believe from the evidence that the memorandum of agreement, which reads as follows [as before] was reduced to writing at the time the agreement testified to by the several witnesses for the plaintiff and defendant was entered into, and on the day on which it bears date; and that said memorandum was reduced to writing by the plaintiff or his agent with the purpose, on his part, of perpetuating the terms of the agreement between plaintiff and defendant, as such agreement was understood by plaintiff, and that said memorandum of agreement was read to the defendant as and for a correct statement of the terms of agreement, in the presence of the said witnesses, and was assented to as read by both the plaintiff and defendant, said memorandum was thereupon signed, in the presence of plaintiff and defendant, by said Goldsborough, Murtagh and Windsor as witnesses.

"And if the jury further believe from the evidence that the plaintiff thereupon and thereafter performed all that was agreed by him to be done under said agreement, as expressed in said memorandum, and that, relying on said agreement, the plaintiff withdrew the advertisement of sale of said property, and that the said property was subsequently sold under a lien prior to the plaintiff's for a sum less than the amount of said lien, then the defendant is estopped from denying the terms of the agreement between plaintiff and defendant, as set out in said memorandum of agreement."

This was also refused, and thereupon the court proceeded to charge the jury as follows:

"The controversy in this case has its origin principally

in what is called the Statute of Frauds, and its application to the facts that have been detailed. This statute was designed to subserve the objects of public policy and justice, and to prevent parties, from slight conversations, swearing to absolute agreements to pay the debt of another person. There must have been a great deal of this species of fraud and perjury in order to have induced Parliament, in the first instance, to have adopted legislation for its prevention. Undoubtedly the statute, although called the statute for the prevention of frauds and perjuries, had also another object in view, namely, to prevent this species of crimes, and in order to do that required contracts of this questionable character to be reduced to writing, so that the contract of the parties might speak for itself. The present case is a singular illustration of the propriety of this object of the statute. If the contract had been reduced to writing in the present case, and signed by the parties, there would, in all probability, have been no controversy, and therefore no litigation. Ever since this statute went into operation it has run the judicial gauntlet as, doubtless, few statutes have done, and has received every species of construction; parties have resorted to every measure of defeating it. The courts themselves have entertained these attempts upon the statute in such a manner as to leave their decision in a most confused, uncertain and unsatisfactory condition.

“In view of the expedition which we have to exercise in a jury trial, I told counsel that it would be unnecessary for them to cite authorities, for the very reason which I had just stated. The authorities are very numerous, and the court could be entertained with an analyzation of the decisions for days and weeks. One of the modes of taking cases of this kind out of the statute undoubtedly has been where there has been an original agreement, founded upon an adequate consideration. For instance, if the foreman of this jury should promise to pay a debt due from one of his brother jurors to one of the counsel in this case, receiving therefor a good and substantial consideration—say, the indebtedness being \$1,000, and he received a consideration

of \$500 or \$100—that might be considered an original contract from which he derived a substantial benefit. Then the law says, if he has allowed the other party to execute his part of the contract, and received the benefit himself of the performance of the contract, it would be fraudulent to allow him to retain this benefit, and to also allow him the benefit of the statute. The courts have felt themselves constrained to recognize exceptions to the statute of this description, and to enforce contracts, although the promise was not reduced to writing or signed by the parties. I state this by way of illustrating the manner in which this statute has been administered by the courts.

[“It is said that this case belongs to this class of exceptions; that there was an original agreement upon adequate consideration between Mr. Hill and the plaintiff in this case. It will be your duty to consider carefully the circumstances, to see if there was a benefit derived from any oral contract entered into by Mr. Hill. In the first place, if you find that the contract was, as claimed by the plaintiff here, and, in the next place, that Mr. Hill has derived a substantial benefit from that arrangement, then probably the plaintiff has a right to sustain this action and to recover what was stipulated, although it was by parol.] What are the circumstances of this case? First, Mr. Hill says that there was no such agreement as that referred to by the plaintiff. The paper has been quite a conspicuous feature during the whole trial. It is conceded on all hands that Mr. Hill refused to execute that paper.

“You can readily see how inconvenient it would be if a lawyer should come to your place of business with a written contract, even although you had discussed the subject previously with him, and request your signature to it, and if you should refuse it, that you were still bound by the terms of that contract. The object of a written contract is to show the precise meaning of the parties to it, and after the parties have executed the contract to bind them so that they cannot afterwards deny or alter by parol the circumstances existing either before or at the time. [When a party utterly refuses

to execute a paper, I am not aware of any rule of law or of common sense that makes it bind him.] But it is said that Mr. Hill assented to the terms of the contract, saying that he would abide by the contract; that his word was as good as his bond. Here we come to the conflict of testimony between the parties as to what the contract was. The plaintiff in the case, by his witness and counsel, contend that it was a promise on the part of the defendant to pay an indebtedness due from Murtagh to the plaintiff, whenever he should realize from this claim, over a certain amount, if he should realize from it \$9,400. That is the idea of these gentlemen as to what the arrangement was, and that this was not conditional at all, but was an absolute undertaking. Mr. Hill contends that the arrangement was a conditional one, and depended upon the then negotiation that was being conducted with a view to a compromise of a certain claim against the District. He states that he was authorized by Mr. Murtagh, and I think there is no dispute about that, to make the compromise. A claim had been put in suit by Mr. Murtagh against the District, and the suit was then going forward. In this stage of the case, Mr. Murtagh made an assignment of that claim to secure Mr. Hill, and in that assignment vests him with all the rights necessary to effect the compromise of the claim, he, as a minimum, to take thirteen thousand and some odd hundred dollars, and to go up as high above that as possible.

The District refused to compromise, although advised to do so by their counsel. They were amply punished for their refusal to accept a moderate compromise, because a judgment was finally recovered for double the amount. It appears, then, that the compromise fell through, and if Mr. Hill is correct in his statement of what the arrangement was, his responsibility to the plaintiff in this action ceased with the failure of the compromise, as it was conditional upon that throughout. From that time the suit went on, and the attorney for Murtagh collected and paid Mr. Hill no more than the amount of his debt, minus, I believe, some interest which he still claims. What became of the balance of the

money is not clearly determined, but that is of no consequence here. The consideration for the agreement to pay the plaintiff here grows out of another branch of the case, and it appears that Murtagh owned a farm in Maryland, upon which there were two encumbrances. He executed, or gave judgment by confession, for the third (following words inaudible). This invested Mr. Hill with an equitable interest in that property, and he had the right of redeeming it from prior encumbrances, or had the right to sell it, subject to the claims of parties holding such encumbrances. It is said that he, and the representative of the plaintiff in this case, prevailed upon them to stay their advertisement; to withdraw their advertisement; they having sought to enforce the collection of that demand, by an execution, and had advertised the property for sale. The advertisement was undoubtedly withdrawn, for we heard nothing further from the sale. No further proceedings, as far as we can learn from the testimony in this case, was taken in this direction. [That is said to be the consideration for this promise to pay the debt. If you can see in all these circumstances which I have gone over, with as much respect for the testimony in the case as I could possibly exercise, that Mr. Hill has derived an absolute benefit from this, and that he promised absolutely and generally to pay this judgment of Mr. Williamson's, then I instruct you that the plaintiff will be entitled to recover.] If you come to the conclusion that the arrangement was a conditional one, and that Mr. Hill undertook only to pay in the event of effecting a compromise that was then pending, and if that compromise fell through, then the defendant would be entitled to a verdict. [If you come to the conclusion that he has, upon the whole, received no beneficial consideration for the compromise to pay this debt of Mr. Murtagh, you will also find a verdict in his favor."]

To the refusal of the court to permit the memorandum of agreement to go to the jury, and to grant the instructions prayed for, as well as to such portions of the foregoing charge as are inclosed in brackets, the plaintiff excepted, and the case came to the General Term upon a motion for a new trial.

HANNA & JOHNSTON and R. H. GOLDSBOROUGH for plaintiff.
F. W. JONES for defendant.

Mr. Justice JAMES, after stating the case, delivered the opinion of the court :

The first question that presents itself for the consideration of this court is, whether the memorandum of agreement should have been allowed to be read to the jury. We have nothing to do with the truth of the testimony in regard to this memorandum, or of the statements contained in it. We have only to determine what legal result should follow in case they are true, or are believed by the jury to be true. All that we now say, is, that if the testimony in regard to it is believed by the jury to be true, then there was a parol agreement between the plaintiff and defendant, the terms of which are to be found in this paper. The rule is plain, that where parties agree verbally that the terms of a verbal agreement which they have entered into is to be found as stated in a certain paper, that paper is the proper evidence of the particular matters to which they have verbally agreed ; not that the paper is the contract between them, but that it is the best statement of what it is they have agreed to verbally ; and it should, if the contract be a proper one to be enforced, be submitted and read to the jury as the best evidence of what that contract was. This paper should, therefore, have been allowed to be read to the jury as a part of the evidence of the parol agreement, provided there was anything to submit to the jury in the shape of a contract. Nor was it proper, with the paper thus assented to as the correct statement of the contract, that the witnesses should have been allowed to state from their memories what the contract was, even though in doing so they were allowed to look at the paper to refresh their recollection. For even after looking at the paper, they would be remitted at last to their recollection, while if the testimony is to be believed by the jury, the parties had agreed that the facts and terms of the agreement should be found in this memorandum, and that it was to be resorted to as the evidence of their agreement.

It is true that the testimony shows that Hill said he would not sign any contract, giving as his reason that his word was as good as his bond; and it is argued from this that he really did nothing more than give his word of honor. As we have already said, the court has nothing to do with the credibility of the statement. We have only to determine what the legal effect of his statement is, if the jury believe it to be true. Now, it seems to us that when one induces another to forego an advantage, it is unreasonable to suppose that the understanding between them is that that advantage is given upon an assurance that is not to be regarded as a promise, but as a mere offering of his word as a man of honor. It would be a fraud on the other party to induce him to forego an important advantage when he is about to enforce his lien against the land, and to make his money, and leave him with no other promise than that the promisor would behave like an honest man. If that is contended, we think it must be distinctly and intelligibly shown. Coupling this consideration with the fact that the same testimony goes on to say that he (Hill) said the agreement might be reduced to writing, and that afterwards when the paper purporting to be the statement of the agreement was shown to him he assented to it, a case is stated in which there was a promise which might be construed by the court—in case the jury find the fact of a promise—to be an actual agreement, and not a mere pledge of honor. Business is not conducted in that way. Men do not surrender security for a claim on a mere assurance that the other party will conduct himself well, but who at the same time refuses to bind himself.

- But there is another question in regard to this memorandum, which it becomes important to consider, and that is, whether the exclusion of this paper, although error, injuriously affected the case of the party complaining, for if it did not, we ought not to grant a new trial on the ground of its erroneous exclusion. If, for example, such an agreement made by parol was not binding, it would be immaterial that it was excluded. It was argued that it comes within the Statute of Frauds; that it was an undertaking to pay

the debt of another, and should have been in writing and signed by the party to be charged, or his duly authorized agent. On the other hand, it was claimed that that was an original, direct promise made by Hill to Williamson, upon a consideration between them, and was not in any sense collateral to Murtagh's debt, although the money which Hill is alleged to have promised to pay, would satisfy and extinguish Murtagh's debt.

Several grounds were alleged as sufficient to take the case out of the Statute of Frauds. It was said, for example, that inasmuch as the testimony, if believed, shows that the consideration of withholding this sale was good, if performed, and that it was performed, we have a case of an executed consideration, and that it would be a fraud on the part of the promisor to set up the Statute of Frauds, and that to such cases the statute has no application.

It is said, too, that Hill made the promise in consideration of a benefit to himself, and that, therefore, it was necessarily an original promise. We shall deal with only one of these reasons. The law seems to have been most satisfactorily stated by Chief Justice Shaw. In that case a promise was made in the case of *Nelson vs. Boynton*, 3 Metcalf, 396, when an attachment had been laid on certain property, by another person, that if the attachment was withdrawn, the promisor would pay the debt. Chief Justice Shaw, after stating that there must be in every case, whether the contract were in writing or verbal, a sufficient consideration, said:

"It is not enough that a sufficient legal consideration for a promise is proved, if the object of the promise is the payment of the debt of another, for his account, and not with a view to any benefit to the promisor. * * * The terms, original and collateral promise, though not used in the statute, are convenient enough to distinguish between the cases where the direct and leading object of the promise is to become the surety or guarantor of another's debt, and those where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is

to subserve or promote some interest or purpose of his own. The former, whether made before or after, or at the same time, with the promise of the principal, is not valid, unless manifested by evidence in writing. The latter, if made on good consideration, is unaffected by the statute, because, although the effect of it is to release or suspend the debt of another, yet that is not the leading object, on the part of the promisor."

Several cases are cited in illustration of this position, and the court then proceeds to say:

"The rule to be derived from the decisions seems to be this: That cases are not considered as coming within the statute when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but where the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance, or benefit to him, it is within the statute."

To apply this rule to the present case, we find that the testimony which would govern it, if believed, is that Hill had a judgment coming after the lien of the plaintiff, as a lien on the same property. If the property should be sold under the plaintiff's lien, and only bring the amount of the first and second liens, Hill would lose all security by his judgment lien. If it should bring more, he would get something. He had, then, an interest in preserving this property from sale. The testimony discloses his position just as the testimony in the case of the broker referred to by Chief Justice Shaw showed an interest on the part of the broker. The broker had been employed to sell certain goods which were taken in attachment. His interest was to go on and sell them. He promised under the circumstances that if the attaching creditor would release his attachment, he would pay the debt. He was making a bargain for his own benefit.

The philosophy of the matter seems to be as it is stated by Chief Justice Shaw, that in one class of cases all that can be said of the promise is, that it is made in order to get relief for another person, and it is, therefore, nothing but

a promise to pay the debt of another person; but if the promisor has an interest of his own in the matter it is not a promise to pay another person's debt, but to pay what he adopts as his own debt. It is the price which he undertakes to pay for a benefit which he seeks. It happens that another person owes that money too; but there is nothing unreasonable in a party undertaking for a benefit which he receives thereby, to pay a certain sum which happens at the same time to be owing by another. We do not conceive that to be an undertaking in any sense to answer for the debt or default of another person. If he does not pay it, it will be his own default simply and directly. It is an original, direct undertaking on his own behalf, and not on behalf of another person, and is, therefore, not within the statute.

If, then, this testimony were to be believed, it involves a case of a promise which would be valid, although made verbally. The exclusion of this memorandum statement of the verbal contract, inasmuch as it was the best evidence, may well have had an injurious effect with the jury, because they were less likely to believe a statement from memory undertaking to set forth all of the terms of the agreement, than they were to believe the single statement that this paper had been agreed to by the parties as setting forth the terms of the agreement which had been verbally entered into. In the latter case the jury would have for their consideration the credibility of a single statement only, namely, the statement that this paper was agreed by both parties to be a correct statement of the parol contract. We can see, therefore, that the exclusion of this paper might have very materially affected the case of the plaintiff in the minds of the jury, and hence it was an error which the court must take notice of.

Later on in the charge the court came to treat this very question as to the validity of the parol agreement. Thus, after stating the case which did not come within the statute, and stating especially the case where the parol contract had been executed, the court said:

"It is said that this case belongs to this class of excep-

tions; that there was an original agreement upon adequate consideration between Mr. Hill and the plaintiff in this case. It will be your duty to consider carefully the circumstances, to see if there was a benefit derived from any oral contract entered into by Mr. Hill. In the first place, if you find that the contract was, as claimed by the plaintiff here, and, in the next place, that Mr. Hill has derived a substantial benefit from that arrangement, then probably the plaintiff has a right to sustain this action and to recover what was stipulated, although it was by parol."

A statement of the rule of law on that subject is made further along. I shall be obliged to read some portion of the charge which is not excepted to in order to make intelligible that part which is.

"It is said that he, and the representative of the plaintiff in this case, prevailed upon them to stay their advertisement; to withdraw their advertisement; they having sought to enforce the collection of that demand by an execution, and had advertised the property for sale. The advertisement was undoubtedly withdrawn, for we heard nothing further from the sale. No further proceeding, as far as we can learn from the testimony in this case, was taken in this direction. That is said to be the consideration for this promise to pay the debt. If you can see, in all these circumstances which I have gone over, with as much respect for the testimony in the case as I could possibly exercise, that Mr. Hill has derived an absolute benefit from this, and that he promised absolutely and generally to pay this judgment of Mr. Williamson's, then I instruct you that the plaintiff will be entitled to recover."

I read again the explanatory part, in order to show the meaning of the next clause excepted to:

"If you come to the conclusion that the arrangement was a conditional one, and that Mr. Hill undertook only to pay in the event of effecting a compromise that was then pending, and if that compromise fell through, then the defendant would be entitled to a verdict. If you come to the conclusion that he has, upon the whole, received no beneficial con-

consideration for the compromise to pay this debt of Mr. Murtagh, you will also find a verdict in his favor."

It is true, of course, that the party must receive the beneficial consideration; that is to say, if the consideration is promised and is not performed, there can be no recovery. But this mode of charging the jury gives them to understand that the consideration promised must turn out to be a benefit. That is the inevitable effect of the language used—that he must derive a substantial benefit. Now, the consideration was the withdrawing of this advertisement for Hill's benefit. It might not turn out to be of any use to him at all. For example, if Mr. Murtagh should take out of his pocket the debt he owed him and pay him, he would owe nothing to the withdrawal of the advertisement. Nevertheless, it is a perfect and sufficient consideration if the promisee submits to a sacrifice and withdraws his advertisement for the benefit and in behalf of the interest of the promisor, and not for the benefit of the original debtor, another person. This instruction leaves the jury to suppose that the benefit must turn out to be a substantial benefit to this party. It was enough, although it did not benefit him in the end, although he got his money from another source and not from this man, that the promisee made the sacrifice in behalf of his interest, and kept his promise. The testimony tends to show that he did both; that he made the withdrawal and continued to keep it out for the length of time agreed upon. That made a case of a promise made upon a consideration and under such circumstances as to show that it was not a promise to pay the debt of another, but a promise to pay that which the promisor undertook to make his own debt.

For these reasons, we think that there was error in the trial below, and that a new trial must be granted.

Mr. Chief Justice CARTER dissented.

IN THE MATTER OF THE PETITION OF GEORGE E. KIRK, RELATIVE TO THE BANKRUPTCY OF THOMAS B. ENTWISLE AND GEORGE O. BARRON.

{ Decided February 25, 1884.
{ Justices COX and JAMES sitting.

1. Whether the general superintending power granted by section 4966, R. S. U. S., to the Circuit Court of the United States over questions arising in the District Court, when sitting as a court of bankruptcy, is possessed also by this court sitting in General Term over the Special Term when holding a court of bankruptcy. *quære*.
2. But even though this court possesses such power, it cannot interfere, except on appeal, to review an order passed by the Special Term holding a court of bankruptcy, when such order is appealable.
3. By section 772, R. S. D. C., any order passed in a cause by any special term of this court, is appealable to the General Term without regard to the amount involved, if it affect the merits of the controversy; hence, the provision of the Bankrupt Act providing for appeals from the district courts to the circuit courts, where the matter involved is over five hundred dollars, does not apply to this court, for a general act does not apply to a case which is governed by a special act.

THE CASE is stated in the opinion.

H. O. CLAUGHTON for petitioner.

WALTER D. DAVIDGE and HENRY WISE GARNETT, *contra*.

Mr. Justice JAMES delivered the opinion of the court.

In the case of the petition of George E. Kirk, filed in this court, in the matter of the bankruptcy of Thomas B. Entwisle and George O. Barron, it is shown in the petition and the papers in the case, which were also submitted to us, that Mr. Edwards, as assignee of Entwisle & Barron, filed a bill praying that certain conveyances of property held by Mrs. Entwisle should be set aside and the property treated as assets of the bankrupt Entwisle, on the ground that the latter had paid the purchase money, and had caused the conveyances to be made to her in fraud of his creditors. A decree was made in General Term setting aside the conveyances and declaring the property assets of the bankrupt. From that decree an appeal was taken to the Supreme Court of the United States. While that appeal was pending,

an offer was made by counsel in behalf of Entwisle and Mrs. Entwisle to surrender to the assignee without further litigation certain specified pieces of the property involved in the suit of the assignee.

Under section 5061 of the Revised Statutes the assignee proceeded to entertain this proposition. That section provides that the assignee, under the direction of the court, may submit any controversy arising in the settlement of demands against the estate, or of debts due to it, to the determination of arbitrators to be chosen by him and the other party to the controversy, and under such direction may compound and settle any such controversy by agreement with the other party as he thinks proper and most for the interest of the creditors. The assignee, without undertaking to act on his own responsibility, made a report of that offer to the justice sitting in bankruptcy, and an order *nisi*, followed by an absolute order, was made, confirming the arrangement and instructing him to accept the proposition, on the theory that Mrs. Entwisle, holding certain property which was claimed to be assets by the assignee, came within the provision of a debtor to the estate, and that this power of arbitration, under the direction of the court, applied where there was that kind of indebtedness by a party who had to account for property instead of money.

No appeal was taken from that order to the General Term, but one of the creditors, Mr. Kirk, filed his petition here on the theory that the general supervising jurisdiction of the circuit courts throughout the United States, over questions of bankruptcy arising in the district courts, belonged to the Supreme Court of the District of Columbia in General Term, over the special term holding a court of bankruptcy. The question whether the grant of the powers of the circuit courts to this court, found in the Revised Statutes for the District of Columbia, includes this power, was very learnedly discussed, and the court was urged to settle the general question whether this court, sitting in General Term, can exercise this power. As there was some difference of opinion upon this question, we have concluded that it is

not necessary for us to decide it, because we think the matter may be disposed of upon another ground.

It is provided by the Bankruptcy Act, section 4986, that the circuit court for each district shall have general superintendence and jurisdiction of all cases and questions arising in the district court for such district, when sitting as a court of bankruptcy, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not; and except when special provision is otherwise made, may, upon bills, petition, or other proper process of any party aggrieved, hear and determine the case as in a court of equity; and the powers and jurisdiction hereby granted may be exercised either by the court in term time, or in vacation by the circuit justice or by the circuit judge.

It was held, in the case of *Smith vs. Mason*, 14 Wallace, 419, that where there was a special provision for a review of the case, as, for example, by appeal, the circuit courts could not exercise this direct and original jurisdiction and supervision. Mr. Justice Clifford, in delivering the opinion of the court, said:

"The power to revise all cases and questions which arise in the district courts in such a proceeding, except when special provision is otherwise made, is conferred upon the circuit courts by the first clause of the same section; but the court is of opinion that the power conferred by that clause does not extend to any case where special provision for the revision of the case is otherwise made; as where it is provided that an appeal will lie from the district court to the circuit court."

Under that ruling we must hold that if an appeal will lie from this order, the General Term, even if it possess this superintending power, cannot exercise it in this case. It must come up by appeal. The general bankrupt law provides for appeals from the district courts to the circuit courts, where the matter involved is over \$500. We cannot apply that to this court, because a general act does not apply to a case which is provided for and regulated by a special act. It is a principle which has been asserted since Coke's

time, that a special statute applicable to a particular case shall govern that, although a later general rule which might have included all cases has been passed. Now, this court has a law of its own as to appeals. By section 772, R. S. D. C., any order pronounced at any special term of this court, may be reviewed here on appeal without reference to the amount involved, if it affects the merits of the case, and is not a mere interlocutory order. It was argued that the *case* means the case of the bankrupt. But a case of bankruptcy contains a great many cases, that are involved in and become a part of the case of the bankrupt estate, and an order passed in reference to any of them, would be appealable if affecting the merits. The order, however, complained of in this petition seems especially to be an order which affects the merits of the whole matter. It affects the merits of the bankrupt's settlement, and consequently the case of all the plaintiffs. We think it is quite clear that an appeal could have been sustained from this order, since it affects the quantity of assets of the bankrupt, and that, therefore, under the ruling in *Smith vs. Mason*, we are not at liberty to pass upon it.

Of course we say nothing about the merits of the order. We are not at liberty to do so upon a motion to dismiss a petition for want of jurisdiction. We only decide that we cannot take supervision in a case which could have been appealed. For these reasons the petition is dismissed.

DISTRICT OF COLUMBIA *vs.* J. H. & E. K. JOHNSON.

LAW. No. 19,485.

{ Decided March 3, 1884.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. A corporate seal is not necessary to the validity of the contract of a municipal corporation.
2. By an act of Congress (May 15, 1820), the corporation of Washington was given express power to "erect, repair and regulate public wharves, * * * and to regulate the manner of erecting, and the rates of wharfage at private wharves." Under this power, instead of appropriating money to be expended in the construction of a wharf, the corporation contracted with the defendants, that if the latter would erect a wharf at their own expense, and deliver it up at the end of ten years, the corporation would allow them the use of the wharf for ten years, upon the further consideration of the annual payment of a thousand dollars, reserving the right on the part of the corporation to take possession of the wharf upon paying the cost, or a proportional part of the cost, with reference to the time of occupancy by the defendants.

Held, A legitimate exercise of the power to *erect* wharves.

3. The chief engineer of the army has no power to issue a license to erect wharves in the District of Columbia; whatever power the commissioners of the Federal city, to some of whose powers he succeeded, may have had in that respect, expired when Congress assumed legislative jurisdiction over the District.
4. In an action to recover rent of a wharf, plaintiff, the District of Columbia, offered, without objection or subsequent contradiction on the part of the defendants, evidence showing that defendants had admitted holding the premises in question under a lease from the District, and had paid the District rent therefor under said lease.

Held, That the court was warranted in assuming that the defendants held the property under this lease.

5. Where a party enters into possession under a lease, he is estopped from questioning the right of his lessor.
6. It is error to leave to the jury the question whether anything of value was given to or conferred upon defendants by plaintiffs for payment of which suit is brought, as that leaves to the jury a question of law, *i. e.*, *value* in its legal sense.
7. Limitations may be pleaded to a parol contract to pay rent, when the contract consists of an ordinance of a municipal corporation, for leasing, assented to by the proposed lessee.

THE CASE is stated in the opinion.

RIDDLE & MILLER for plaintiff.

HINE and BIRNEY for defendants.

Mr. Justice Cox delivered the opinion of the court.

This action was brought to recover rent alleged to be due from the defendants, as tenants, under a lease heretofore executed to them by the corporation of Washington. The circumstances of the letting, as the evidence on the part of the plaintiff tended to show, were as follows:

On the 7th of December, 1867, the corporation of Washington passed an act in the following terms, in part, to wit:

"That permission be and hereby is granted to J. H. Johnson and E. K. Johnson to construct at their own expense, and without any cost to the corporation, by reason of any expenditure or liability that may be incurred by them on account thereof, a wharf on the Potomac, at a point to be selected between 12th street west and 13th street west, and to erect thereon such buildings as may be necessary for the work and storage that may be required by the fishing business."

Then follows a proviso which it is unnecessary to recite.

Section 2d of said act is as follows:

"That in consideration of the making of the wharf and erection of the buildings above contemplated and provided for, and as a full remuneration for the labor and expenses thereby incurred, and for the further consideration of the payment to this corporation of an annual rent of one thousand dollars, the same to be paid quarter-yearly, in sums of two hundred and fifty dollars each, the said J. H. and E. K. Johnson, their heirs and assignees, shall have the full and entire use of the said wharf and its appurtenances, from the time of its completion until the expiration of ten years from the date of the passage of this act."

Then another proviso.

Section 3. "That at the expiration of a period of ten years immediately following the passage of this act, or at any previous time, when the occupant or occupants of the said wharf shall refuse or neglect to keep it in good order or repair, or to comply with the police laws of this corporation, the privilege of occupying or using the said wharf, the prop-

erty to which it is attached, or any of the appurtenances of the said wharf, as conferred in the second section of this act shall immediately cease and terminate, and the entire property, of which the conditional use and enjoyment is thereby granted, together with the wharf hereby authorized, and all improvements thereon or connected therewith, shall revert to and become the property of this corporation, free from any charge or claim whatsoever on the part of the said J. H. and E. K. Johnson, their heirs or assignees, for or in consideration of the erection of the wharf, or of any rent paid therefor, or of any improvements therein or connected therewith, which they shall have made while enjoying its use and occupancy under the provisions of this act."

The act further provided: "That if the corporation shall before the expiration of the aforesaid ten years, wish to take into its possession, for public use, the said wharf and appurtenances it shall have the right to do so by paying to the said J. H. and E. K. Johnson, their heirs and assignees, a proportional part of the money expended by them in constructing and improving the said wharf, in proportion to the length of time their occupancy may bear to the whole amount."

An additional section (4) enacts: "That this act shall not take effect until the said J. H. and E. K. Johnson shall have entered into an obligation with the mayor, binding themselves and their heirs and assignees, in the sum of six thousand dollars, to a faithful fulfilment of all the requirements of this act, and that at the end of the term herein named they will relinquish and convey to this corporation the said wharf and all its appurtenances, free of any cost or charge therefor or on account thereof."

On the 22d of January, 1868, the corporation passed an additional ordinance providing:

"That so soon as the wharf authorized to be erected on the Potomac river, between 12th and 13th streets west, a part of December 7th, 1867, shall have been completed and such buildings erected thereon as may be necessary for the work and storage required by the fishing business, th

said wharf shall be, and is hereby established as a fish wharf and dock, and may be used as such by the proprietors thereof, or their assignees, so long as they shall continue to occupy said wharf under, and comply with, the terms and conditions of the above-mentioned act."

On the 7th day of February following, the defendants, together with Charles B. Church, as security, executed the bond required by the fourth section of the act, which referred to the act, and contained a condition that they "shall faithfully, diligently and honestly execute, perform and fulfill all and singular the requirements of an act passed and approved December the 7th, 1867."

The evidence further tended to prove that the defendants went into, or continued in, possession of the wharf under these acts of the corporation of Washington, and paid rent for a period of one year and three-quarters, amounting to seventeen hundred and fifty dollars, and after that date they refused to pay more rent, and this suit is brought to recover the rent that accrued from the date at which they ceased paying, to the date of this suit.

At the trial, the plaintiff objected to the admission of various matters of evidence offered on the part of the defense, and their exceptions to the admission of that evidence come here upon a motion for a new trial, and we proceed to examine the defenses set up in the case.

It may be proper to notice a preliminary position that was taken in the argument here by the counsel for the defendants. It is said that, upon the very face of the record, it will be observed, that the contract relied upon by the plaintiff is void, and that it is useless to send the case back for a new trial. It is undoubtedly true, that the court will not reverse a judgment below and order a new trial upon the ground of instructions adverse to the plaintiff, if it can be seen from the record that the plaintiff has no case and cannot make one if he has a new trial. How is it in the present case? It is urged here that the so-called lease is void, because it is not a lease under the seal of the corporation, and several authorities have been cited in support of that position.

We had supposed that the doctrine that a corporation, either municipal or private, could not make a lease or other contract by parol, or otherwise than under their corporate seal, had been long since exploded, but in deference to the counsel who asserts this position, we have examined the authorities submitted by him. The first is the case of *Kinzie vs. Chicago*, 2 Scam., 187. It seems, in this case, that the corporation of Chicago had the title of "The Trustees of the Town of Chicago," and that these trustees executed a lease which purported to be interchangeably executed under the seals of the parties thereto; the lessee, in fact, signed his name with a seal; the trustees signed their individual names without any seal at all; at least, without any corporate seal; and the court simply held that that was not the deed of the corporation. That case does not affect the general question at all, of the capacity of a municipal corporation to lease otherwise than by deed.

In the case of *Doe, &c., against Thomas Duncan*, 1st Jones, North Carolina Reports, 239, it was simply held, that, in an ejectment suit, the mere ordinance of a town, not under the seal of the corporation, not expressing a consideration, not delivered to parties claiming title thereunder, did not amount to a conveyance of a legal title, so as to make out the chain of title which the plaintiff must establish in an ejectment suit.

The cases of *William H. Copp vs. John Neal*, 7th New Hampshire, 275, and *Cofran vs. Cockman*, 5th New Hampshire, 458, are simply against the position for which they are cited.

The former case holds that a vote of the town is evidence of title without a deed. The case in 5th New Hampshire holds that lands belonging to a town may be conveyed by deed in the name of an authorized agent, though, generally, the deed must be in the name of the principal. So that none of these authorities support the position for which they have been cited, viz., that a lease is invalid because it is not under the seal of the corporation.

It was also suggested that the corporation had no right

to lease the wharf at all, but only to regulate the sale of fish. It is unnecessary to discuss this question, because the license in this case was substantially an exercise of an express power given to the corporation of Washington *to erect wharves*. Instead of appropriating public money to be expended in the construction of a wharf, they contracted with the defendants that if the latter would erect a wharf at their own expense, and deliver it up at the end of ten years, the corporation would allow them the use of the wharf for ten years, upon the further consideration of the annual payment of a thousand dollars, reserving the right, on the part of the corporation, to take possession of the wharf upon paying the cost, or a proportional part of the cost, which the defendants incurred in constructing said wharf, considered with reference to the time of occupancy. This seems to us a very economical, wise and legitimate exercise of the power conferred upon the corporation, *to erect wharves*.

Passing, now, from this preliminary consideration, we proceed to consider the defence in this case. The principal, if not the only defence, is, that the defendants claim title from another source of authority than the corporation of Washington; that is, they claim to hold under a license from the commander of the engineer corps of the army. The substance of the testimony is, that at and before the time when these acts were passed by the corporation of Washington, one John Pettibone was in possession of the property, which has been decided by us and the Supreme Court of the United States to be *public* property, as a squatter, not having any rights at all; that he had brought a quantity of lumber there with a view of erecting a wharf, and had made application to the chief of the engineer corps for a license to construct a wharf there; and that Charles B. Church, and one of the defendants, bought out his rights, whatever they were; that is, bought out his lumber and his possession, and, in anticipation, the rights that he was to acquire under this license that he had only applied for and not received, having also his agreement that when he received the license he was to assign it to them; and that,

in point of fact, on the 18th day of January, 1868, which was after the first ordinance was passed, but before the second was passed, and also before the bond was executed (before which execution the first ordinance was not to go into effect at all), the license was issued by General Humphreys to John Pettibone; and in pursuance of the agreement between him, Pettibone, on the one hand, and Church and Johnson on the other, it was formally assigned to them about three years and a half afterwards, and put on record; and they claim that this license gave them title to erect a wharf there, and that they are under no obligation to recognize the rights of the corporation of Washington, although they took a lease from it.

The claim of the defendants is, that the power to issue this license was conferred by the act of the Assembly of Maryland of December 19th, 1791, upon the commissioners of the Federal city, and that by successive acts of legislation, it has been transmitted to the commander of the engineer corps of the army.

By act of Congress of July 16, 1790, which is entitled, "An act for establishing the temporary and permanent seat of the Government of the United States," the President of the United States was authorized to appoint three commissioners, with full powers:

First, to survey, define and limit a district for the seat of the Federal Government.

Second, to accept such land as the President may deem proper for the use of the United States.

Third, to provide suitable buildings for the accommodation of Congress, the President, and the public offices.

In June, 1791, after the Federal city had been selected and bounded, the proprietors of the land lying within the limits of the city conveyed all their land, or nearly all, to certain trustees, well known as Beall and Gantt, upon certain trusts in the deeds mentioned. One of the trusts was that *these commissioners* should lay out the city into squares, lots and streets, and make a division of these lots between the proprietor and the Government of the United States, and

that the lots so assigned to the United States, in this distribution, and the streets and avenues, should be conveyed by these trustees to the Federal commissioners, and then a further trust was, that these commissioners should sell the lots from time to time, as the President should direct.

There were certain powers given to the Federal commissioners by the deeds from the original proprietors, in addition to the powers that were vested in them by the act of July, 1790. The act of 1791, of the State of Maryland, also gave certain powers to these commissioners. One of these was, that where minors, married women, persons *non compos mentis* and non-residents, were interested in lands, these commissioners should make an allotment of them between the proprietors and the United States. The act, by its own force, vested the title of these lands in the trustees named in the deed of trust that I have already mentioned. Another was, that they might institute proceedings to condemn land of the original proprietors who were *sui juris*, and who failed to convey. Thirdly, they had power to keep a record of all allotments and sales of land in the city of Washington; and, fourthly, to take acknowledgments of deeds of lands in the District of Columbia.

Now, it will be observed, that some of these powers were of a permanent character, or of indefinite duration. They were to last just as long as it was necessary to provide buildings for the accommodation of Congress and the public offices, to make allotments between the original proprietors and the Government, to make sales of lots belonging to the United States, according to the trusts in the deeds from the proprietors, and to keep a record of all allotments and sales of land, and take acknowledgments of deeds.

Some of the powers conferred by the act of Maryland were of a purely temporary and provisional character, and among them the power which has been invoked in this case.

Section 12 of the act of December 19, 1791, provides:

"That the commissioners aforesaid, for the time being, or any two of them, shall, from time to time, *until Congress shall exercise the jurisdiction and government within said ter-*

ritory, have power to license the building of wharves in the waters of the Potomac and Eastern Branch, adjoining said city, of the materials, in the manner and of the extent they may judge durable, convenient, and agreeing with general order; but no license shall be granted to one to build a wharf before the land of another, nor shall any wharf be built in said waters without license as aforesaid; and if any wharf shall be built without such license, or different therefrom, the same is hereby declared a common nuisance."

In passing, it may be observed that this seems to be nothing more than the power to issue licenses to private persons to build wharves on their own property, upon certain conditions imposed by the commissioners. This is precisely like a license to a man to construct a building on his own land according to certain building regulations, or to prosecute a certain trade. The act expressly excludes the right of building a wharf in front of another man's property, and it can hardly apply to wharves constructed in front of public property. Passing from that, we may observe, that this power was of a temporary character, just like a number of other powers in the same section, among which was the power to license the sale of spirituous liquors in the District. It was a power to license, &c., "until Congress shall exercise jurisdiction and government within said territory."

On the 16th of July, 1790, Congress passed a law declaring that the seat of government shall be transferred to the District of Columbia, on the first Monday of December 1800; and on the 27th of February, 1801, Congress completely assumed jurisdiction, by an "Act concerning the District of Columbia," which established the legal system of the District, by declaring that the laws of the State of Maryland and the State of Virginia, then in force, should be respectively the laws of the county of Washington and the county of Alexandria, in the District of Columbia, and further proceeded to establish a judicial system for the District of Columbia, and put in operation the whole machinery of the government here; so that, by that act, Congress completely assumed to exercise jurisdiction and government

within the territory described in the act of Maryland of 1791. The passage of this law, then, was the limit, in point of duration, of the temporary powers that I have already spoken of, which included the power to license the erection of wharves in the waters of the Potomac and Eastern Branch. There were yet certain powers vested in these commissioners of the character that I have elsewhere described as indefinite in their duration and permanent in their character; such as the power still to make a division of the lots and squares between individuals and the Government, the power to make sales of government lots, and to keep a record of sales, and to take acknowledgment of deeds, and some of these powers have been exercised by the successors of the board of commissioners to a very late date.

On the first of May, 1802, Congress passed an act entitled "An act to abolish the board of commissioners in the city of Washington, and for other purposes." By the first section the board was abolished, and by the second, "The affairs of the city which have heretofore been under the care and supervision of said commissioners shall hereafter be under the direction of a superintendent to be appointed by the President who is invested with all powers and shall perform all duties which the said commissioners are *now vested with or are required to perform*, by, or in virtue of, any act of Congress or any act of the general assembly of Maryland, or any deed of trust from the original proprietors of the lots in said city." The act, therefore, it will be seen, transferred to the superintendent all the powers that were vested, *at that time*, in the board of federal commissioners (the commissioners of the federal city, as they were called). Then, on the 29th of April, 1816, another act abolished the office of superintendent, and transferred his duties to the commissioner of public buildings provided for by said act. Then, by the act of March 2, 1867, it was provided, "That the office of commissioner of public buildings is hereby abolished, and the chief engineer of the army shall perform all the duties now required by law of said commissioner, and shall also have superintendence of the Washington aqueduct and

all the public works and improvements of the Government of the United States in the District of Columbia, unless otherwise provided by law."

It is by virtue of these several acts, that the defendant supposed the power to have become vested in the chief engineer of the army, to issue this license; but if the view that we take of this legislation is correct, that power, which was in the commissioners of the federal city, expired at the date when Congress assumed legislative jurisdiction over this District, and, therefore, it was not transmitted to the chief engineer of the army.

But even if it can be supposed that the power was not abolished, but that it passed in the general devolution of the powers conferred upon the commissioners of the federal city through the superintendent and commissioner of public buildings, to the chief engineer of the army, still it would take effect in subordination to any special legislation of Congress on this subject. Now, we find that Congress, as far back as 1812, passed an act entitled "An act further to amend the Charter of the City of Washington," in which they declared that taxes authorized by the act should "be expended in each ward" upon certain objects among which was "erecting and repairing wharves." But, later on, and on the 15th of May, 1820, they passed an act entitled, "An act to incorporate the inhabitants of the city of Washington and to repeal all acts heretofore passed for that purpose," and in that they conferred upon the city of Washington power "to preserve the navigation of the Potomac and Anacostia rivers, adjoining the city, to *erect, repair and regulate public wharves* and to deepen creeks, docks and basins to regulate the manner of erecting and the rates of wharfage at private wharves." We suppose this power to erect public wharves is a power to erect them upon public property, and not upon private property. This act, therefore, confers upon the city of Washington the plenary power to erect and repair public wharves. Under that, it is clear that the city of Washington had the right to license the building of the wharf which is the subject of controversy in

this suit. The power, then, claimed to be in the commissioner of public buildings or the chief engineer of the army, his successor, to issue licenses for the building of wharves, would be inconsistent with the power given to the city. And, therefore, even if the power was conferred on the original commissioners, the act incorporating the city transferred it to the authorities of the city of Washington. Therefore, in our judgment, the engineer of the army never had the slightest power in the world to license the erection of wharves on the Potomac and Eastern Branch, and, for that reason, we think it was error in the court below to admit this license, at all, in evidence. It purports to be a license from the chief engineer of the army of the United States "by virtue of the power vested in him by the act of the assembly of Maryland, passed December the 19th, 1791, to license 'the building of wharves in the city of Washington, in the District of Columbia, and to regulate the material, the manner and extent thereof,' and the several acts of the Congress of the United States, subsequently passed and approved, substituting the said chief of engineers in the place and stead of the commissioners in said act of assembly mentioned." This was offered in evidence, together with the assignment executed by John Pettibone to these defendants. These documents were admitted against the objection of the counsel for the plaintiff, and we think that there was error in admitting them in evidence at all, and furthermore, that there was error in the instruction given by the court on this subject, in the following terms:

"If the jury find from the evidence that on the seventh day of December, 1867, Mr. Pettibone was in possession of the premises for which rent is now claimed by the plaintiff, and his possession was not under the late corporation, known as the mayor, board of aldermen, and board of common council of the city of Washington, but was under the United States, and that the said corporation or the plaintiff did not at any time since the date aforesaid obtain possession thereof, then the plaintiff is not entitled to recover."

This instruction is clearly erroneous. The instruction

was, that if possession was under the United States Government, the jury should find for the defendants; the evidence offered to establish that possession under the United States Government was wholly inadmissible.

But, independently of that exception, there is another objection to that instruction. Even if it be true that Pettibone had squatted down upon this *public* property, as we have decided it to be, before this act of the corporation of Washington was passed, and even if the defendants could be said to hold under a license from the United States, it is also perfectly plain, from the record, that they in like manner held, at the same time, under this lease from the corporation of Washington. There was offered in evidence at the trial, by the plaintiff, a bill in equity, which had been filed by these defendants against third parties, to prevent them from interfering with the defendants in this suit (with the rights claimed by them under the ordinance of the corporation of Washington), in which they say, after reciting these ordinances of the corporation of Washington, and also the license from the chief engineer of the army of the United States "that in pursuance with the authority *so conferred* upon your orators *by the ordinances* and grant aforesaid, and also such other right and authority as the general ordinances of said city give to responsible persons to build private wharves on the said river front, your orators proceeded to erect, and have erected, a large wharf at the locality aforesaid, and in so doing have laid out and expended a large amount of money," &c. That bill is signed by one of these defendants, and sworn to, and the same defendant, in his deposition, states, "the grant I have is for ten years, and I pay the corporation \$10,000, and the superintendent \$1,500 per year; and if I fail to comply with my part, I forfeit the wharf and all its appurtenances and my bond, with security for \$6,000." There was also offered in evidence a letter from the defendants, through their attorney, addressed to the attorney of the corporation, with reference to this very claim of rent, in which they complain of not having derived certain advantages from their lease, and wind up

by appealing simply for an equitable consideration of the case, and say, "*the Johnsons do not contest the right of the District government in the premises, but only ask that any claim or demand it may have against them be equitably adjusted.*" This evidence was put in without any objection, and there is not one word of evidence in contradiction of it, and the court is therefore warranted in assuming the fact to be true that these parties held this property under this lease, from the corporation of Washington. They have recognized the rights of the corporation of Washington, by taking and holding a lease from them, and by paying rent for the wharf for a year and three-quarters. What difference, then, does it make if they choose to fortify their possession also from some other source of authority? It is not for them to deny their title from the corporation of Washington, and to set up a title from a third party; they are absolutely estopped from so doing. This is an elementary principle of law, which it is useless to discuss. Though there may have been some semblance of authority to give a license in the chief engineer of the army, yet when these parties come in directly under this lease, it is not in their power to question the right of the corporation, their landlord, upon the ground that they have also derived a grant from and occupied these premises through some other authority. For that reason, there is another one of the instructions which were given by the court below which seems to be clearly erroneous. That is in the following terms:

"If the jury find from the evidence that, on the seventh day of February, 1868, the possession of the premises, for which rent is now claimed by the plaintiff, was not in the said late corporation of the city of Washington, or in persons holding under said late corporation, but in Mr. Pettibone and his guarantees, all of whom claim to hold under a license from and by permission of the United States, exclusive of any claim by said corporation, and that the said corporation or the plaintiff did not at any time before the beginning of this suit, obtain possession thereof; then the plaintiff is not entitled to recover." Under this prayer the

jury are told that if the defendants *claim* to hold under the United States, then they must render a verdict for the defendant. We think that this is clearly erroneous. There are two or three instructions which are of the same family. Here is another one:

"Unless the jury find from the evidence that the defendants were let into possession of the land by the plaintiff, or the late corporation of the city of Washington, the plaintiff is not entitled to recover." This, in view of what we have already stated and referred to, ought not to have been given. Again, "If the jury find from the evidence, that the plaintiff has neither given to nor conferred upon the defendants anything of value for what it has brought this action against them to recover, then it is not entitled to recover." Besides other objections, there is one fatal one to this, viz., that it leaves the jury to determine a question of law, that is, whether any value, *in a legal sense*, was derived by defendants from the execution of this lease by the corporation of Washington. There are two other instructions relating to the bond which was executed by the defendants to the plaintiff, asserting substantially that if the bond was executed under a mistake of fact or on misrepresentation, the jury should find the bond void. We hardly see the pertinency of these instructions, because the suit is not brought upon the bond, and, besides, there was no evidence introduced as a foundation for them.

At the trial an instruction was asked upon the part of the plaintiffs to this effect: "The court is requested to instruct the jury that, as the suit is brought upon the ordinance of the corporation of Washington city, the limitations pleaded by the defendants is not a bar." This proceeds upon the idea that the suit is brought upon a statutory liability. We do not take that view of it, however. It seems to us that the liability does not arise by force of the ordinance or statute, but that the ordinance is simply a proposition upon the part of the city, accepted by the defendants, and it is the acceptance of the defendants which constitutes their agreement, and the suit is brought upon that agreement. That agreement is

simply a parol one, although it is fortified by a collateral bond under seal. We think that this suit is affected by the plea of limitations.

For the reasons given before, we think the verdict must be set aside and a new trial given.

IN THE MATTER OF THE APPLICATION OF GEORGE FRY FOR A WRIT OF HABEAS CORPUS.

{ Decided March 3, 1884.
{ The CHIEF JUSTICE and JUSTICES COX and JAMES sitting.

1. Inasmuch as the jurisdiction of the police court to convict an accused of an offence against the criminal laws of the United States, without a trial by jury, has been acquiesced in for nearly fourteen years, this court declines, at this, the first time that the jurisdiction has been formally assailed, to enter upon the examination of the question, but passes the prisoner on to the Supreme Court of the United States, if he should think proper to appeal to that tribunal. At the same time, it is intimated that, if the police court were just entering on its existence, this court would feel bound to consider the question, and would do so, perhaps, with some prepossession against the jurisdiction.
2. Under the act creating the police court, the punishment is the criterion by which the offense is to be considered infamous. Offences which are punishable only by imprisonment in the District jail are, by this act, non-infamous offences, as petit larceny and the receiving of stolen goods amounting to less than \$25 in value, are such offences, and they may be prosecuted in the police court by information, without being, on that account, obnoxious to the provision of Article V of the Constitution of the United States, which declares that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury.
3. If distinct offences, although of a similar character, are set forth in several counts in the same indictment, and *a fortiori* if set forth in different indictments or informations, it is in the power of the court to impose cumulative sentences—that is, periods of confinement, each one of which is independent of the other.
4. The prisoner was sentenced upon six separate informations, each one of which set forth the offence of receiving stolen goods. On *habeas corpus*, the petition did not aver more than that the record would show on inspection that there was only one crime committed. It was—

Held, that the record did not show anything of that sort, and that the court had no right to assume that the goods set forth in the several informations were feloniously received at one time as stolen goods.

5. A cumulative sentence of imprisonment is sufficiently certain when imprisonment is made to commence at the expiration of an imprisonment under a previous sentence, the number and date of which is given.

THE CASE is stated in the opinion.

JOHN E. McNALLY for petitioner.

A. S. WORTHINGTON and HUGH T. TAGGART for the United States.

Mr. Justice Cox delivered the opinion of the court.

George Fry made application to Justice Wylie, in criminal court, for a writ of *habeas corpus* to the warden of the jail, requiring the petitioner to be brought before court, in order that the legality of his detention there should be inquired into. The application was refused, and an appeal taken to this court and a writ ordered. The petition was produced and appeared through counsel. In the petition, he complains that, in the police court, he was tried six informations, convicted and sentenced by Judge Smith who was presiding, on each of the six informations, to one hundred and eighty days, or six months, confinement in jail of the District, each sentence to commence after the ending of the former, making in all about three years. He has already been confined in jail for the period of two months.

There were several positions taken in argument, and the first is that the act of Congress, by which the police court was established in 1870 is unconstitutional, so far as it purports to vest in the judge holding that court the right to convict an accused party of an offence against the criminal laws of the United States without a trial by jury. When it is admitted that, in reference to offences which are creatures of municipal ordinances, the Constitution would not be infringed by the attempt to confer that jurisdiction on the court, the law is supposed to offend against Article three, section two, of the Constitution of the United States which contains the following clause: "The trial of

crimes, except in cases of impeachment, shall be by jury," and Article six of the amendment to that instrument which declares, that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed."

It will be remembered that the act creating the police court, while it is a virtual authority to the justice presiding over it to try the prisoner, nevertheless gave the prisoner a right of appeal to the Supreme Court of the District, which is untrammelled by any conditions at all, and which, when exercised, virtually supersedes the judgment of the police court. It is not denied, in argument, that if the prisoner has his election to be tried by court or jury, the trial by jury is virtually preserved and the right is not infringed. But it is said that he must have the right to be tried in the first instance by a jury, and the language used by Judge Blatchford in the *Dana* case is cited to the effect that the accused is entitled, not to be first convicted by a court and then to be acquitted by a jury, but to be convicted or acquitted, in the first instance, by a jury.

On the other hand, it is claimed that this untrammelled right of appeal, from the conviction by the police judge, substantially preserves the right of trial by jury and saves the act of Congress from the offence of violating the Constitution of the United States.

If the police court were just entering upon its existence, we should feel bound to consider this question, and perhaps should consider it with some prepossession in favor of the position taken by the prisoner. But that court has been in existence nearly fourteen years; its jurisdiction has been acquiesced in, and this is the first time that it has been formally assailed before this court. At the same time, it is to be observed that there is a strong array of authority in the State courts, under constitutional provisions similar to that of the Federal Constitution, in support of the position that the right of appeal from a conviction by a justice to another court, with the right of jury trial in the latter, vir-

tually does preserve the right of trial by jury, and that the accused, in that way, has all the benefit that the Constitution intended to confer upon him. We shall, therefore, decline to enter upon the examination of this question at the present time, and pass the prisoner on to the Supreme Court of the United States, if he thinks proper to appeal to that tribunal on this question.

Another question made is, whether the accused could be tried for such an offence as is set forth in these informations, without previous presentment or indictment by a grand jury. Article five of the amendments to the Constitution provides that no person shall be held to answer for a capital or otherwise ~~infamous~~ crime unless on a presentment or indictment of a grand jury, with certain exceptions relating to military offences, either in the army or navy, or in the militia.

Now, whatever the common law may be on this subject, we have held that the act creating the police court makes the punishment of the offence the criterion of its being infamous or not in its character, and that offences which are punishable only by imprisonment in the jail of the District, are to be treated as non-infamous offences, such as petit larceny and the receiving of stolen goods amounting to less than \$35 in value. Both those offences are punishable by only six months confinement in the common jail, and we have held that they are properly non-infamous offences, and therefore the provision of the Constitution of the United States would not apply to this class of cases, and we do not feel disposed to reconsider this point.

Another point is, whether the justice below has a right to impose cumulative sentences. Here were six informations and six convictions, and each imprisonment after the first was to commence on the expiration of the preceding one, making altogether about three years. It has been held, and was held particularly in the Tweed case, so well known in New York, that where similar offences are charged in different counts of the indictment, and punished, each one, by confinement in the penitentiary, all the periods of punishment by imprisonment must run concurrently; that it

amounts to only one sentence, no matter how numerous the charges. That is, if a man steals one pair of shoes one day, and the next day another, and a dozen different offences are committed, he cannot be punished by more than one term of imprisonment for the whole, any more than in one case. That doctrine in the Tweed case is repudiated both in England and in this country, by the weight of authority, and we are satisfied that if distinct offences, although of a similar character, are set forth in several counts in the same indictment, and, *a fortiori*, if set forth in different indictments or informations, it is in the power of the court to impose cumulative sentences, that is, periods of confinement, each one of which is independent of the other.

Another question made is, whether the record in these cases discloses more than one crime, and it is claimed that although there were six different informations, yet only one crime has been committed. The petition is a little ambiguous. We do not understand whether it means to allege that only one larceny was committed, or one offence of receiving stolen goods was committed. These are six separate informations. Each one of them sets forth a positive offence of receiving stolen goods. They describe the goods, the different values, and, as far as we can gather from the record, those were distinct offences. We have no right to suspect, much less to assume, that all these goods were feloniously received at one time as stolen goods. The record does not disclose that only one offence was committed, and the petition does not even aver it. It avers simply that the records would show, on inspection, that there was only one crime. But we think the record does not show anything of that sort.

The matter troubling me the most has been the point made as to the uncertainty of the sentence. It is claimed that the sentence is so vague and uncertain, as to the commencement and termination of the confinement of the prisoner, as to be void. For instance, one of the sentences, number 23,939, I think, is for receiving stolen property, and the record shows the sentence to be, that the prisoner should

be imprisoned one hundred and eighty days in jail, the sentence to take effect upon the expiration of an imprisonment under sentence in case number 22,937 of the same date—that is, of January 3d, 1884. The proposition maintained is, that the sentence on its face ought to show the exact length of imprisonment without compelling the prisoner, or anyone else, to resort to other records to find out when the imprisonment commences and terminates, and that if it does not, it is void. Two cases have been cited upon this question one in 18 Ohio State Reports, and the other in 22 Ohio State Reports. In the first case, however, the sentence was to take effect at the expiration of the sentence in case number so and so *aforesaid*, and inasmuch as there had been no allusion to any other case in the previous part of the sentence, it was irretrievably vague and uncertain, and held to be void. That would not apply to this case, however because it refers to a distinct case, giving the title and date of it. In volume 22 of the same reports, there was a case in which the reference was to another case, without indicating the date of it or the court in which it had taken place. The date here is clearly given, and the indication is sufficiently clear that the conviction was in the same court. So that neither of these cases has application to the present one. On the other hand, we have examined the precedents, and we find that sentences like this, and sentences even much more vague than this, have been sustained both in England and in this country. One is the case of the Queen *vs.* Cutbush, 2 Queen's Bench, page 379, where the imprisonment was adjudged by a justice "to commence at the expiration of the first term of three calendar months, an imprisonment to which he has this day been adjudged by us the said justices." That is even more vague than the present case because it does not give the number of the case. Another case was Kile *vs.* Corum, 11 Metc., where the sentence was to be executed from and after the expiration of four former sentences, without indicating where they took place, or what the date was. That was held not to be erroneous, although the judgment was reversed on other grounds. Still another

case is that of *Mills vs. Cowen*, 13 Penn., 631, where a man was indicted for attempting to procure an abortion of a certain female, and the sentence was for an imprisonment, "to be computed from the expiration of the sentence on the indictment for attempting to procure abortion of another female." Nothing could be more vague than that, for it does not state where it took place, the date or the number of the case. The case of the People *vs. Forbes*, in 22 Cal. Reports, 135, is very much like this. There were five separate sentences passed on the defendant on the 6th of September, 1862, by the Recorder's Court of San Francisco, the first for a period of confinement of ninety days, and each of the others was for ninety days: "Said term to commence at the expiration of previous sentences." Now, each one of the sentences under consideration is to commence at the expiration of the previous sentence, the number and date of which is given. It is more definite than in the case just cited.

So that we think the requirement of the law as to certainty is sufficiently gratified by the references contained in the sentences. We cannot think, therefore, that they are void.

One or two of these objections, perhaps, would be more appropriately considered on appeal, and not as justifying the court in discharging the party on habeas corpus. But it is sufficient to say that we do not consider that the record has disclosed any errors, and therefore the prayer of the petition must be refused, and the prisoner must be remanded to the custody where the habeas corpus found him.

UNITED STATES, EX REL. JOHN M. HENDERSON, Trustee,
 vs.
 JAMES B. EDMUNDS ET AL., Commissioners of the District of
 Columbia.

LAW. No. 24,988.

{ Decided March 8, 1884.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. On a petition for mandamus against the Commissioners of the District this court can only direct the Commissioners to go on and execute their office, when it appears on the petition that they have refused to do so. But where it becomes their duty to examine alleged errors in an assessment it is immaterial whether in that examination they decide well or ill, if it appears that they have examined and determined; the writ of mandamus cannot do the work of a writ of error.
2. Though the court might decline to interfere by mandamus, it may, nevertheless, with a clear opinion on the subject, inform the Commissioners of their duty in the premises.
3. The words in the act of Congress of February 21, 1871, which imposed upon the Board of Public Works the duty of assessing a proportion of the cost of street improvements "upon the property adjoining and to be specially benefited by the improvement," were used merely as a *designation of the property*, and not as a condition on which a charge was to be made upon it. To hold these words to mean that an assessment could only be made upon the property adjoining, *provided* it be benefited by the improvement, would be equivalent to inserting in the statute a limitation which would have been distinctly stated if intended.
4. Hence, the Board of Public Works, in making an assessment upon adjoining property under the act of February 21, 1871, was not charged with the duty of inquiring whether the property was benefited, but only to determine the cost of the improvement, and to distribute this cost between the owners of the adjoining property and the District, to do which it had only to ascertain the frontage by measurement and whether the property was specially exempted from assessments. There was no provision that the board was to act as a jury to determine whether the property was benefited; the assessment did not depend upon that condition.
5. It follows, therefore, that it is not in the power of the Commissioners when they come to act under the statutes (Acts of Congress of June 19, 1878, and June 27, 1879,) authorizing them to correct erroneous or excessive assessments, to consider anything but the elements that go to make up the charge. They cannot consider or attempt to adjudicate whether the property was benefited.

STATEMENT OF THE CASE.

This was a petition for the writ of mandamus against the

Commissioners of the District of Columbia, based upon the following facts:

Lot R, square 25, fronting 231 feet on M street, N. W., between 24th and 25th streets, in the city of Washington, the property of Mrs. Mary C. Henderson, was assessed according to frontage for special improvements made on M street in the year 1872, \$1,452.92; and the same lot for special improvements made on 24th street in 1876, was assessed in like manner, \$1,085.90. These assessments, with accrued interest, amounting in all to \$2,631.85, were paid respectively January 22, 1874, and February 24, 1877. Afterwards, in compliance with the act of June 27, 1879, there was duly filed with the Commissioners of the District, and within sixty days after the passage of the act, a written complaint alleging error in the said assessments and praying a revision of the same, on the ground that no special benefit had accrued to the said lot by reason of said improvements.

The relator alleged that the Commissioners refused to make this revision, and a mandamus was prayed accordingly.

A demurrer was filed to the petition upon the following grounds:

1. That the construction of the 37th section of the act of February 21, 1871, and the 1st section of act the of August 10, 1871, contended for by the relator, is entirely erroneous.

2. By presumption of law, property adjoining on a street specially improved is thereby benefited, the statute referred to left it to the judgment and discretion of the Board of Public Works to appraise the amount of the benefit; which said board having done, its judgment is conclusive in the premises.

3. Congress, by its act of June 19, 1878, affirmed the validity of the assessments complained of; which said act in its full legal effect was recognized and affirmed by the Supreme Court of the United States in the case of *Mattingly and others against the District of Columbia*.

The relator joined issue upon the demurrer, thereby dissenting from the propositions of laws above formulated.

The statutes relating to the questions raised are as follows:

An act to provide a Government for the District of Columbia approved February 21, 1871.

* * * * *

"SEC. 37. There shall be in the District of Columbia Board of Public Works. * * * The Board of Public Works shall have entire control of and make all regulations which they shall deem necessary for keeping in repair streets, avenues, alleys and sewers of the city, and all other works which may be intrusted to their charge by the legislative assembly or Congress. They shall disburse upon their warrant all moneys appropriated by the United States or the District of Columbia, or collected of property held in pursuance of law, for the improvement of streets, avenues, alleys, sewers, roads and bridges, and shall assess in such manner as shall be prescribed by law, upon the property adjoining and to be specially benefited by the improvement authorized by law and made by them, a reasonable proportion of the cost of the improvement, not exceeding one-third of such cost, which sum shall be collected as all other taxes are collected."

An Act to provide for the revision and correction of assessments for special improvements in the District of Columbia, and for other purposes, approved June 19, 1878.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Commissioners of the District of Columbia be, and they hereby directed to enforce the collection, according to existing laws, of all assessments for special improvements prepared under an act of the legislative assembly of August tenth, eighteen hundred and seventy-one, as charges upon the property benefited by the improvements in respect to which said assessments were made: Provided, That upon complaint being made to the Commissioners, within thirty days from the passage of this act, of erroneous or excessive charges in respect to any of said assessments which remain unpaid, said Commissioners are hereby authorized to revise such assessments so complained of, and to correct the same.

and where certificates of assessment have been issued, they shall issue to the *holder* of such certificate a drawback certificate for the *amount* of *such* erroneous or excessive charges, which certificates shall be received at any time in payment of assessments for special improvements, and they shall be redeemed in the *manner* prescribed for the redemption and purchase of certificates, as provided by an act of the legislative assembly of May twenty-ninth, eighteen hundred and seventy-three, entitled, "An act for extending the time of payment of special assessment, and for other purposes," after the provisions for the purchase and redemption of *certificates* named in the act shall have been fully carried out.

An Act fixing the rate of interest upon arrearages of general taxes and assessments for special improvements now due to the District of Columbia, and for a revision of assessments for special improvements, and for other purposes, approved June 27, 1879.

* * * * *

SEC. 3. That the Commissioners of the District of Columbia are hereby authorized and directed, upon written complaint being made to them within sixty days from the passage of this act, by any person or persons who had, prior to June nineteenth, eighteen hundred and seventy-eight, *paid* their special improvement taxes, prepared under an act of the legislative assembly of said District, of August tenth, eighteen hundred and seventy-one, that their said assessment or assessments were erroneous or excessive, to revise and correct such assessments so complained of; and in case the amount of any such assessment is found to be erroneous or excessive, the commissioners shall issue to the person entitled to the same, a drawback certificate for the amount of such excessive or erroneous charge, which certificate shall be received in payment of all special assessments, and for all general taxes, due before the first day of July, eighteen hundred and seventy-seven: *Provided*, That complaints filed under the act of June nineteenth, eighteen hundred

and seventy-eight (paid or unpaid), by a property holder, his agent or attorney, need not be refiled under this act.

The other facts necessary to an understanding of the case appear in the opinion.

CRITTENDEN & MACKEY and WILLIAM BIRNEY for relator.

A. G. RIDDLE and FRANCIS MILLER for respondents.

Mr. Justice JAMES, after stating the case, delivered the opinion of the court.

The case comes up on demurrer to the petition of the relator.

The court can only direct the Commissioners to go on and execute their office, if it appears on the petition that they have refused to do so.

It is shown that improvements were made in constructing M street, between 24th and 25th streets northwest, in this city, bordering on lots described as belonging to Mrs. Henderson; that assessments were made, amounting in the aggregate to \$2,631.85, which were paid on the 24th of February, 1877, and that Congress afterwards passed an act authorizing the Commissioners to revise and correct assessments which were erroneous and excessive, and to allow a drawback for the amount of the excess or error; that the petitioner, in pursuance of the requirements of this act, presented a petition for correction of his assessment, alleging that the whole of the assessment was erroneous and excessive, on the ground that no benefit was bestowed on the property by this improvement, but that, on the contrary, the property was seriously injured. They urge that the statute prescribing the manner and defining the cases in which the Board of Public Works was to assess any charge upon property, required that the property should appear to be benefited thereby. The language of that statute is as follows:

"The Board of Public Works shall assess, in such manner as shall be prescribed by law, upon the property adjoining and to be specially benefited by the improvement authorized

by law, and made by them a reasonable proportion of the cost of the improvement, not exceeding one-third of such cost."

This subject was presented to the Commissioners; argument was made to them that no benefit was conferred upon this property; that the law requires that, before any charge could be made upon the property, such benefit should have accrued, and that therefore the whole assessment was erroneous. It appears that those propositions were argued, and that the Commissioners, acting through their secretary, in the usual manner, made the following reply to the petitioner's counsel:

"OFFICE OF THE COMMISSIONERS,
DISTRICT OF COLUMBIA.

Messrs. CRITTENDEN & MACKEY and

E. W. WHITAKER, *Attorneys, &c.*

GENTLEMEN: Referring to the statement submitted by you respecting the assessment of lot R, in square 25, property of Mrs. M. C. Henderson, I am directed to inform you that, after careful consideration of your brief, and of the statements submitted in a hearing before the full board on this date, the Commissioners conclude that the special assessments heretofore levied in this and other like cases on the property adjoining street improvements, are not erroneous, and are not subject to revision, under the acts approved June 19, 1878, and June 27, 1879, in the manner claimed by you.

Very respectfully,

W. TINDALL, *Secretary.*"

It was urged at the argument by the demurrant that the concluding statement in this letter, that the assessments in question were "not subject to revision under the acts approved June 19, 1878, and June 27, 1879, in the manner claimed" by the petitioner, amounted to a refusal of the Commissioners to enter upon an official duty. We think that this is an incorrect interpretation of the answer of the Commissioners, and of their official action. The petitioner

shows that the error in the assessment which was presented to the Commissioners, was alleged to have arisen from the fact that the assessment was made in a case where no benefit was bestowed on the property assessed. The answer of the Commissioners shows that they had examined all the grounds on which error was alleged, and that they had decided that the assessment was not erroneous. If, as was argued by the relator before them, it was their duty to consider whether the absence of benefit rendered the assessment erroneous, they performed that duty, and there is no unperformed duty which this court can command them to perform. It is immaterial whether they decided well or ill so long as they performed the duty of examining and determining whether the assessment was erroneous or excessive. The writ of mandamus cannot do the work of a writ of error.

But we are asked by counsel for the District to inform the Commissioners, notwithstanding we might decline to interfere with them by mandamus, what their decision should have been. The Supreme Court of the United States has more than once taken such a course after stating that the case before it was not a proper one for the remedy sought; and as we have a very clear opinion on this subject, we shall act upon that example.

We shall consider, then, the meaning of this statute which enjoined upon the Board of Public Works the duty of assessing a proportion of the cost of the improvement, not exceeding one-third, upon the property adjoining and to be specially benefited. Counsel for the petitioner claim that this "property adjoining and to be specially benefited," meant that the assessment was to be made upon property adjoining, provided it be in fact benefited. The statute says nothing of that kind. It only states that the assessment is to be upon property adjoining and *to be* specially benefited. Afterwards, when Congress validated the proceedings of the Board of Public Works, the validating act used the words "property adjoining *and* specially benefited," but that expression was not intended to affect the construction to be put upon the original act, and we think it is entirely clear,

that the original words, "property to be benefited," were intended merely as a *designation of the property*, and not as a condition on which a charge was to be made on that property. The intention of the legislature, in using the words, "to be benefited," was to give the reason why a part of the burden of a street improvement was assessed upon "the property adjoining"—a mode of expression not uncommon in legislation. To hold that such a provision intended that an assessment should be made upon the property adjoining *provided* it was benefited, would be equivalent to inserting in the statute a limitation which would have been distinctly stated if it was intended. Moreover we must suppose that Congress intended to establish some uniform scheme for assessing the cost of a general system of improvements, and the construction claimed by the relator would destroy all uniformity.

A number of cases were cited on the part of the relator, in which it was held that no assessment could lawfully be made on property which was not benefited in fact; but we observe that in all of these the law expressly limited the assessment to such property as was benefited. Such cases have no bearing upon the construction of a statute which contains no express limitation.

The reasonableness of the construction insisted upon may be tested by its operation. The Board of Public Works was charged, first, with the making of a contract by which the whole cost of a street improvement should be determined; and, second, with the distribution of this cost between the owners of adjoining property and the District. If they were authorized by the statute to assess a part of that cost, not exceeding one-third, upon adjoining property because it was assumed in law that such property was specially benefited, their executive and ministerial powers were equal to the work to be done. They had only to ascertain the frontage by measurement, and whether the property was specially exempted from assessments. But if they were to make an assessment on adjoining property only in case it was benefited, they would have to do a work for which

no means were furnished them. We find no provision that they were to act as a jury; no provision whatever that would meet the necessities of such an inquiry. The whole system of power and method would have to be implied; and that, too, in the absence of any *express* provision that they were to determine the fact of benefits at all. We are of opinion, then, that the Board of Public Works was not charged with this inquiry, and that an assessment upon adjoining property did not depend upon a condition that such property should be found to be thereby specially benefited. It follows that an assessment would not be shown to be erroneous in law because resulting damage to the property appeared to have neutralized the benefit. In such cases the working of the general rule would undoubtedly be hard, but that consideration does not affect the validity of the proceedings or the construction of the statute under which they are taken.

We should have reached these conclusions if the question had been one of first impression; but we think that it has been settled substantially by the Supreme Court of the United States in the case of *Mattingly vs. The District*, 97 U. S., 67. In that case the cost of the improvement, in the construction of the sewer on Seventh street, in front of certain property, was charged on that property by the frontage. That was before the act of Congress validated the proceedings of the Board of Public Works, in making charges at all. One of the points made was, that assessments according to frontage on the street were unauthorized and illegal, and the court held that the statute, which rendered valid the assessments, validated that system. It is true the question, whether the particular property was benefited or not, was not raised in that case, but the court covered this ground when they held that assessment by frontage was the system which the later statute validated.

We think, therefore, the question is closed, and that it is not in the power of the Commissioners, when they come to act under the statute authorizing them to correct erroneous or excessive assessments, to consider anything but the ele-

ments that go to make up the charge. It is not in their power to consider or attempt to adjudicate how the property itself was benefited. The demurrer of the respondents, therefore, is sustained.

THE UNITED STATES vs. THOMAS DUNN and ROBERT MURPHY.

CRIMINAL DOCKET. No. 14,924.

THE UNITED STATES vs. THOMAS DUNN.

CRIMINAL DOCKET. No. 14,925.

{ Decided March 3, 1884.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

In the District of Columbia, on the trial of any felony other than treason or a capital offence, the defence is entitled to ten peremptory challenges and the Government to three.

THE CASE is stated in the opinion.

H. H. WELLS and A. S. WORTHINGTON for the United States.

A. B. WILLIAMS for defendants.

Mr. Chief Justice CARTER delivered the opinion of the court.

These cases present identical questions of law, and for that reason they have been argued and submitted together.

The defendants were indicted for grand larceny, were tried and convicted of that offence, and are here on exceptions to the ruling of the court below in allowing them only four peremptory challenges, whereas they insist that, being on trial upon a charge of felony, they were entitled to ten. They also except to the further ruling of the court below in allowing the Government three peremptory challenges, the defendants claiming that they were not entitled to any. In these two exceptions and the law involved in them rests whatever there is of error in these cases. The learned counsel, in the presentation to us of their views, have dis-

played great industry and intelligence in tracing the history of the challenge of jurors in civil and criminal trials in this jurisdiction, and of the legislation having application to it. The legislation of the various States of the Union upon the same subject has also been laboriously pursued, with the view of exhibiting the evil which Congress evidently intended to remedy when it attempted to bring the administration of justice in the federal courts to a uniform rule; for, before the act of 1867, these courts respected the rule ordained by the statutes of the several States, and these were as variant as the States themselves, only two peremptory challenges being permitted by some, while others allowed as high as thirty. From the light which this discussion has thrown upon the subject, it is evident that before the act of 1867, excepting in cases of treason and capital crimes, no peremptory challenges were allowed in this District to either side. It is not necessary, therefore, to go behind the act of 1867 in the very brief examination which we propose to make of the law bearing upon this case.

The act of February 22, 1867, section 11, reads as follows: "Be it further enacted, that on the trial of any person charged with a crime the punishment whereof may be confinement in the penitentiary or District jail, the defendant shall be entitled to four peremptory challenges of jurors." June 8, 1874, five years later, Congress passed this statute: "Be it enacted, &c., that section 2 of the act entitled 'an act to regulate the proceedings in criminal cases,' be and the same is hereby amended to read as follows: That when the offence charged is treason or a capital offence, the defendant shall be entitled to twenty, and the United States to five, peremptory challenges. On the trial of any other felony, (as of the cases now before us), the defendant shall be entitled to ten, and the United States to three, peremptory challenges, and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges, and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section."

Now, if those two statutes were addressed to the same jurisdiction, no question could arise, for the latter is **unmistakably** a repeal of the former. The latter statute provides **peremptory** challenges for the United States; the former did **not**. The latter provides ten peremptory challenges for the **defendant**; the former provided four, and both of these **features** of the two statutes are incompatible and directly **inconsistent** with each other. The last statute, the statute of 1872, provided for the whole subject. It entered into the **design** of Congress, whatever jurisdiction they were dealing **with**, to make a complete and entire provision for this subject, and after passing away from capital crimes into felonies, and then from felonies, it provided that in all other **cases**, civil and criminal, each party should have three **challenges**. It was evidently the legislative purpose to cover **this** whole subject, and if both statutes had been addressed to the jurisdiction of the District of Columbia and its courts, no question of this sort could have been raised in this case; to **read** them is to interpret them.

The only question, therefore, is whether these statutes **apply** to this jurisdiction. Now, the act of February, 1871 (R. S. D. C., sec. 93), provides, and it seems impossible for **more** comprehensive or more definite language to be used: "**The** Constitution and laws of the United States, which are **not** locally inapplicable, shall have the same force and **effect** within the District of Columbia as elsewhere in the **United States**."

So, then, if the act of 1872, is not inapplicable to this **District**, then the law in regard to challenges in criminal and **civil** trials in this court is settled by that act. We do not **suppose** it is necessary to spend any time in discussing that **question**. That the provision of this statute is applicable to **this** District no reasonable man will doubt. That is the **whole** of this question. The act of 1872 is in force in this **District**, and being utterly incompatible with the law of 1867, operates, under all the rules of construction, to repeal it. It is, therefore, the opinion of the court, that the **defendant** is entitled to ten peremptory challenges in a

case of felony, and that the United States is entitled to three. We have no doubt upon the subject.

The judgments in these cases are reversed and a new trial ordered.

GEORGE R. TOLMAN *vs.* SETH L. PHELPS.

LAW. No. 21,319.

{ Decided March 3, 1884.

{ The CHIEF JUSTICE and JUSTICES COX and JAMES sitting.

In an action for malicious prosecution, it is error to leave to the jury the determination of the question whether the defendant had probable cause for the prosecution complained of. It is the duty of the court to instruct the jury what facts, if proven, would constitute such probable cause; and it is the province of the jury to determine whether such facts are established by the testimony.

STATEMENT OF THE CASE.

On June 4, 1879, the defendant caused the plaintiff to be arrested on a charge of embezzling certain building plans, drawings and specifications, which had been prepared, wholly or in part, by the plaintiff while in defendant's employ as an architect. The plaintiff, after trial, was discharged, and the action in this case was brought by him to recover damages from the defendant for malicious prosecution.

At the trial below, the court, after reviewing the testimony, and dwelling upon certain features of it as bearing upon the question of probable cause, concluded the charge to the jury as follows:

"Now, the whole question is, whether, in the first place, Mr. Phelps, as a reasonable and just man, had probable grounds to believe that Mr. Tolman intended fraudulently to convert those drawings to his own use. It is admitted that they were in his possession; that Tolman had been in employment for Phelps in some capacity or other, and that these drawings had come into his possession in the course of that employment. He would, therefore,

come within the terms of the statute that has been referred to, if he retained them without any claim or right, with a fraudulent intent of converting them to his own use. Now, if you think that Mr. Phelps, as a reasonable man, had probable cause, if you think that such is the case, then, while it was a very serious blunder for him to commit, to have a man arrested for an offence which it turned out finally he was not guilty of, yet if he acted honestly in the premises, he is not subject to this action. Again, if you come to the conclusion that Mr. Riddle, who was his counsel in the replevin suit, and to whom he stated this case (if you believe that was an honest interview between those two gentlemen), advised him that, under the circumstances and facts of the case, Mr. Tolman was subject to prosecution under this statute, on the ground that Tolman withheld these drawings with a fraudulent design of converting them to his own use, that would exclude Mr. Phelps from this action; that is, if it was an honest and fair statement of the case. The question of damage you will consider if you find for the plaintiff."

Judgment went for the plaintiff for the sum of \$500, and the defendant moved for a new trial, taking three exceptions to the rulings and charge of the court below. The third exception alone was considered by the court in reviewing the judgment, and so much only of the case is here dealt with as is necessary to an understanding of the ground of reversal.

The third exception was "to the said charge, for the reason that it left the question of what constitutes probable cause to the jury, and that the jury were not informed by it what circumstances, if proven, would have constituted probable cause for the arrest complained of."

A. G. RIDDLE and FRANCIS MILLER for defendant:

The court below failed to instruct the jury as to what facts, if proven, would constitute probable cause for the prosecution complained of. The rule of law is, that the jury are to find whether the facts claimed as constituting probable cause have been proven, and the court is to determine

whether, as matter of law, the said facts make out a defence of probable cause. The court should tell the jury distinctly whether, the facts being found to be as alleged, probable cause has or has not been established. The justice trying this cause failed to do this, and that failure entitles the defendant to a new trial.

HENRY E. DAVIS for plaintiff:

That the court should tell the jury what facts, if proved, constitute probable cause, is undoubted. But in this case the court met that requirement. Although not embodied in any single, sharply-defined statement to the jury, the facts which would have justified the arrest of the plaintiff were all pointed out by the court in its charge, and the concluding portion of the charge in no wise changes anything already said by the court on the subject of probable cause. It amounts only to saying to the jury: "If you think the defendant had probable cause, as I have defined it, he is entitled to your verdict."

Mr. Justice JAMES delivered the opinion of the court.

We think that a new trial must be granted in this case on a single ground. The testimony on both sides is fully set forth in the record. On that testimony the court below was asked for instructions, some of which were granted and some refused; and finally the court charged the jury with great fullness. At the close of the charge, the defendant excepted to it, claiming that it left the question of what constitutes probable cause to the jury.

The court went over all the circumstances; but it is complained in the third exception that it left the jury to determine what was probable cause. That, we think, was really the effect of the whole instruction, though some portions of the charge began to tell the jury whether this or that fact constituted probable cause. But even after the court had touched upon the effect of particular facts, the jury were, it might be said, affirmatively given to understand that they might make up their minds as to whether the facts might constitute probable cause.

The law in this respect was settled by this court in another case—*Coleman vs. Heurich*, 2 Mackey, 189—it is not necessary to go into authority beyond that. It is settled here, and everywhere, that it is for the court to tell the jury what facts would constitute probable cause. Substantially, the court only told the jury the rule of law, that probable cause was what a reasonable, intelligent man would think justified him in making the charge. It is not everybody who is supposed to know, neither prosecutor nor jury, what facts make up a crime, and therefore it is necessary that the court should tell the jury what facts justify a person in alleging crime. The court did not follow that course, but really gave the jury to suppose that they might examine all that testimony and make up their own minds as to what would constitute probable cause.

There are other points made in the case, but it is enough to say that this clearly misled the jury, and the judgment must be reversed and a new trial had.

CHARLES A. JAMES, CASHIER, vs. ROBERT S. DAVIS ET AL.

LAW. No. 24,568.

{ Decided March 10, 1884.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

In an action on a promissory note, brought by the cashier of a bank in own name, the court will refuse judgment on a motion under the seventh rule, where the affidavit accompanying the declaration, although showing title in the bank, does not contain any allegation to show that plaintiff afterwards became holder of the note,

STATEMENT OF THE CASE.

This was an action on a promissory note, the property of the Bank of Washington. The declaration was filed in the name of "Charles A. James, cashier," and after setting out the making of the note by the defendant Robert S. Davis the order of one Dellinger, stated that the payee "endorsed the same to the plaintiff."

The seventy-third of the General Rules of the court is as follows:

"In any action arising *ex contractu*, if the plaintiff or agent shall have filed, at the time of bringing his action, an affidavit, setting out distinctly his cause of action, and the sum he claims to be due, exclusive of all set-offs and all just grounds of defence, and shall have served the defendant with copies of his declaration and of said affidavit, he shall be entitled to a judgment for the amount so claimed, with interest and costs, unless the defendant shall file, along with his plea, an affidavit of defence, denying the right of the plaintiff as to the whole or some specified part of his claim and specifically stating, also, in precise and distinct terms the grounds of his defence, which must be such as would, true, be sufficient to defeat the plaintiff's claim in whole or in part." * * *

The declaration in this case was accompanied by the affidavit set out in the opinion of the court, which follows; and the defendant Davis filed with his plea an affidavit of defence, not necessary to be considered in the light of the opinion. The plaintiff moved for judgment under the

seventy-third rule, on the ground that the affidavit of Davis, if true, did not set out a good defence. The court below overruled the motion; from which action the plaintiff appealed.

WM. F. MATTINGLY for plaintiff:

The affidavit accompanying the declaration is sufficient; it describes the plaintiff as cashier of the Bank of Washington, and states that the note sued on was discounted by that bank. That a cashier may sue in his own name, for his bank, is beyond question; and the affidavit, showing the plaintiff to be cashier and tracing the title to the note to the bank, sufficiently shows the plaintiff's right to judgment.

A. S. WORTHINGTON for defendant Davis:

The declaration and the affidavit should accord. The former states the note to have been endorsed "to the plaintiff," not adding that he was cashier of the Bank of Washington; the latter shows title to the note in the bank, and while stating the plaintiff to be its cashier, goes no further. A cashier may sue as holder of a note, the property of his bank, but in no other relation to the bank; and the affidavit in this case fails to show the plaintiff to be holder.

Mr. Justice JAMES delivered the opinion of the court.

This action was brought upon a promissory note of five hundred dollars, as follows: "Ninety days after date I promise to pay to Henry M. Dellinger, or order, five hundred and thirty-two dollars for value received, payable at the Bank of Washington, with interest at the rate of seven per cent. per annum until paid. (Signed) Robert S. Davis. (Indorsed.) Henry M. Dellinger." and "protested for non-payment."

To that was appended an affidavit made by the plaintiff, in the following words: "I, Charles A. James, do swear that I am cashier of the Bank of Washington and plaintiff in this action. That the plaintiff's cause of action is the

promissory note sued on and filed with the declaration attached hereto; that the defendant Robert S. Davis is the maker of said note, and that the defendant Henry M. Delinger is the payee and indorser thereof; that said note was discounted by the Bank of Washington for full value, before the maturity thereof, in the ordinary course of business; that said note was duly presented for payment on the date of its maturity at said bank, where, on its face, it is made payable, and was not paid, whereof said indorser was forthwith duly notified; that the amount of said note, five hundred and thirty-two dollars, is justly payable by the defendant to the plaintiff, with interest as claimed in the said declaration, exclusive of all set-offs and just grounds of defence."

The defendant made an affidavit setting up a defence, but the court, under the seventy-third rule, holding that the affidavit of the plaintiff was sufficient, and that the affidavit of defence made by the defendant was sufficient, refused to enter judgment on the note.

The question first to be considered is, whether the affidavit of the plaintiff is sufficient; and if it is not, it is unnecessary to consider the affidavit of defence. It is well-settled law that the holder of a note, even where he is in point of fact the agent for the owner, may sue upon it in his own name. The cashier of the Bank of Washington, if the holder, could sue in that manner. But in his affidavit he states that the note was discounted by the Bank of Washington, and there his affidavit stops, so far as respects the question of holder. He does not state, in addition to that, that after the Bank of Washington became the holder, he succeeded as holder. In other words, the affidavit makes a case up to the point at which the bank was the holder, but adds no facts to show that the plaintiff afterwards became the holder. It makes the case of an agent suing on a promissory note held by his principal, which cannot be done. The plaintiff must sue as holder, although he be only agent.

We have not seen much merit in this matter, but we have been obliged to be so strict heretofore in the application of

the seventy-third rule that we do not feel at liberty to depart from the course that the court has adopted. It is a rule which withdraws cases from the jury, and we have constantly decided, that all of the facts making a case must be set up in the affidavit, so that if they are not contradicted by an affidavit from the other side, the necessity of a jury trial is wholly done away with. Here we find that the affidavit leaves the plaintiff in the possession, not being the holder, of this note, because he has not shown that he is. We feel compelled to adhere to our former decisions in regard to the requisites of the plaintiff's affidavit under this seventy-third rule, and must therefore refuse judgment, and affirm the judgment of the court below.

UNITED STATES, USE OF ALEXANDER ET AL.,
vs.

JOSHUA A. RITCHIE ET AL.

LAW. No. 23,051.

{ Decided March 10, 1884.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. A suit may be maintained in the name of the United States, for the several legatees, against the principal and sureties on an executor's bond, if it is not necessary that a separate suit should be brought to the use of party interested.
2. In a suit upon a bond, where the bond is filed as a public record unnecessary to make profert of it in the declaration.
3. The neglect to make profert is a matter of form and not of substance cannot be taken advantage of on general demurrer.
4. This court will not listen to any mere matters of form on demurrer; were at common law subject to special demurrer, and by the rules of court all special demurrers are virtually abolished.
5. A declaration which states the facts necessary to be stated to make a case, is not demurrable because it contains matters of evidence; the surplusage.

THE CASE is stated in the opinion.

HANNA & JOHNSTON for plaintiff.

HUGH T. TAGGART for defendants.

Mr. Justice COX delivered the opinion of the court.

The case of the United States against Joshua A. Ritchie and others, is a suit brought in the name of the United States for the use of certain legatees, against the principal and sureties, on an executor's bond. It is brought to cover the sum of \$1,151.66, as a balance due to the legatees named in the will of Richard Pettit, who died in August 1873, leaving Joshua A. Ritchie and Louis W. Ritchie his executors. The original declaration was demurred to and it was afterwards amended. That amended declaration was demurred to, and that was again amended, and the second amendment, or third declaration, as we may call it, was also demurred to on two grounds; one being that the declaration does not make profert of the bond sued on, nor is there any excuse for the failure to make profert thereof, and

other that the declaration contains matters of evidence. On the argument, the counsel relied on one ground which was assigned for demurrer to the original declaration, viz., that the suit was brought by several legatees together, instead of each legatee suing for himself; the position being, that although the suit was brought in the name of the United States for the use of parties interested, yet each party interested must sue separately, just as he would have to do if he could sue in his own name.

The precedents have sanctioned this form of suit. In the case of *Maddox vs. The State*, in 4 Harris & John., we find that the suit was brought on an administrator's bond, in the name of the State, for the use of the executor of one of the deceased distributees, and of all the surviving distributees. There was no point made about it, and the thing was acquiesced in, and, *sub silentio*, approved. We find a similar case—that of *U. S., use of, &c., vs. John Rose*, in 2 Cranch C. C. R., 567—where no objection was made to the form of the suit. Another is the case of *U. S., use of Mackey, vs. Coxe*, in 18 Howard, U. S., where the suit was brought for the use of the administrator of the domicile, in the Cherokee Nation, and also of the distributees entitled to the estate of the deceased. And so far as that point was concerned, it was sustained; there were no objections made on that ground at all. We do not think, therefore, the first objection to the suit could be sustained.

The next one to be noticed is the omission to make profert of the executor's bond. The answer to that by counsel was, that in the same case already referred to—of *Maddox vs. The State*—and in several cases referred to, it has been decided that where the bond is filed as a public record, it is unnecessary to make profert of it in the declaration. We think this is a sufficient answer. But in addition to that, the neglect to make profert is a matter of form and not of substance, and it could not be taken advantage of on a general demurrer, as only matters of substance can be. We require a demurrer to be for matter of substance. We do not listen to any mere matters of form on demurrer. They

were, at common law, subject to special demurrer, and by our rules we have virtually abolished all special demurrers.

Another objection was, that the declaration contained matters of evidence. If it stated nothing else but matters of evidence, it would be bad on general demurrer. But we find, on inspection, that it states the facts necessary to be stated to make a case. It states the receipt of money by the defendants, their obligation to pay, and their refusal to pay, and it simply adds: "Although often requested so to do," and "Though directed by the Supreme Court of the District of Columbia, holding a special term for the transaction of public business, to pay over said sum of money as follows," giving different sums, etc. Now, that may be a mere matter of evidence, but it is simply surplusage, and we do not think it is sufficient ground for general demurrer to the declaration.

The demurrer was sustained below, and we reverse the judgment on that ground.

GEORGE MAULSBY vs. JAMES W. BARKER.

LAW. No. 24,505.

{ Decided March 10, 1884.
{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. Where a bill of exceptions contains all the evidence offered in the court below, this court may treat it as a case stated.
2. Where the defaulting owner of property covered by a deed of trust given to secure the payment of a debt, agrees that the advertisement of sale may be for a shorter period than that expressed in the deed, he is estopped from afterwards objecting that the provision made in the deed as to advertising was not followed.
3. *Quære*, Whether, if, before the occurrence of the day of sale appointed by the original advertisement, the day of sale is changed to a later day, the property must be readvertised for the whole period mentioned in the deed.

STATEMENT OF THE CASE.

This was an action of ejectment for the recovery of part of lot numbered 5 in square numbered 453. The defendant, Barker, had borrowed of the plaintiff ten thousand dollars, to secure the repayment of which he executed a deed of trust conveying the premises to Ashford and Mitchell, and providing, in case of default in the payment of the debt, for a sale upon a notice by advertisement inserted in one or more newspapers printed in the city of Washington, three times a week for at least three successive weeks, and providing also "that any sale under this trust may be repeated or postponed from time to time, as to the said trustees or trustee acting shall seem most for the interest of all parties concerned."

The trustees, in pursuance of this provision, advertised the property as follows:

"Trustees' sale of valuable real estate on the north side of H street north, between Sixth and Seventh streets west, at auction.

"By virtue of a deed of trust to the undersigned, bearing date March 2, 1874, and duly recorded in Liber No. 743, folio 461, *et seq.*, of the land records of the District of Columbia, and at request of the party thereby secured, we will expose to public sale, in front of the premises, on *Monday, March*

twenty-sixth, A. D. 1883, at 5 o'clock p. m., the following parcel of ground, viz.: Part of lot five (5), in square (453) four hundred and fifty-three, in Washington city, D. C., beginning for the same at the southeast corner of said lot and running thence west forty-two (42) feet; thence north 132 feet 10½ inches to a public alley; thence east forty-two (42) feet; and thence south to the point of beginning, with all the improvements thereon.

"Terms of sale: One-third cash, balance in one and two years, in equal payments, with interest from day of sale, and secured, or all cash at purchaser's option. A deposit of \$200 will be required at the sale, and if terms are not complied with within five days from date of sale, the trustees reserve the right to sell the property at the risk and cost of the defaulting purchaser, on five days' notice in the Evening Star; conveyancing at purchaser's cost.

"MAHLON ASHFORD,

"JOHN T. MITCHELL.

"Mh6-d4t&eo&ds.

Trustees.

"At request of those interested, above sale is postponed to Monday, April ninth, 1883, same hour and place.

"ASHFORD & MITCHELL,

"Mh24-31&Ap7-9.

Trustees."

The sale then took place on the 9th day of April, as advertised, and the defendant, refusing to vacate the premises, this action of ejectment was brought by the purchaser.

On the trial, Mahlon Ashford, one of the trustees, testified that the sale of the premises was made by himself and Mitchell, trustees, on the 9th day of April, 1883, in compliance with the terms of the trust deed; that the sale of the premises was advertised in the Star on the 6th day of March, to take place on the 26th day of March, 1883; that on the 24th day of March, 1883, the defendant called to see him, and informed him that he hoped to be able to settle the matter by the 9th of April, 1883, and requested him not to sell on the 26th of March, as advertised; and that at such request of the defendant the property was not offered for

sale, as advertised, on the 26th day of March, 1883; that there was no meeting at the place of sale, and adjournment there made of the sale to the 9th day of April, 1883; but that in the issue of the Star of the 24th day of March, 1883, there was added to the original advertisement of sale a notice that the sale was postponed to Monday, the 9th day of April, 1883, same hour and place.

After further evidence as to the rental value of the property, the case was closed; whereupon the court directed the jury to find a verdict in favor of the plaintiff for the possession and for such damages as they thought proved by the evidence. They rendered accordingly a verdict for the possession, and damages for the detention at the rate of \$40 per month.

The case then came to the General Term on a motion for a new trial, on the exception to the ruling of the court in instructing the jury to find for the plaintiff.

The bill of exceptions embodied all the testimony, which was substantially as stated above.

H. E. DAVIS for plaintiff.

H. O. CLAUGHTON for defendant.

The proof in this case is as follows:

The deed of trust prescribed the manner in which the sale should be made, including the period during which the sale should be advertised, and the number of times the notice should be published, to wit, for the period of three weeks, and notice to be published at least three times a week during that period.

The sale was advertised to take place on the 26th day of March, 1883. On the 24th day of March, the defendant stated to one of the trustees that he expected to be able to arrange the matter on the 9th of April, and requested that sale should not be made on the 26th of March.

In the paper of date the 24th of March, the sale was postponed till the 9th of April, and the notice was published only four times between the 24th of March and the 9th of April—a period of sixteen days.

The law, as applicable to the facts thus proved, is as follows:

1. When the sale does not take place on the day appointed for any good reason, the trustee at the place and time may adjourn the sale, for a period shorter than that named in the deed; but in such case, the notices must be given during that period, in accordance with the provisions of the deed. *Richards vs. Holmes*, 18 How., 143; *Jackson vs. Clark, Johns.*, 217; *Perry on Trusts*, sec. 602 *a*.

2. If the day of sale is changed before the time appointed in the original advertisement, then it must be readvertised for the whole of the period, in accordance with the terms of the deed. *Bennett vs. Brendap*, 8 Minn., 385.

In this case the time was changed before the day of sale and the notice of sale should have been for the period named in the deed, and in the manner prescribed by the deed.

If the evidence tended to prove that the defendant consented that the sale should take place on the 9th of April which is denied, even then, though the period of advertisement was shortened, there was no change in the number of times the notice should be published weekly.

The new period was sixteen days, and there were only four publications of notice during that time, when there should have been at least seven out.

The distinction between the case of an adjournment on the day of sale and a postponement before the sale is evident. In the first case, the sale is advertised for the period named in the deed, and the adjournment is only a prolongation of that period.

In the second case, after postponement is made, before the expiration of the period, and for a shorter time, then there never was a notice of the day of sale for the period prescribed by the deed.

In this case, even if it could be presumed from the evidence that the period was shortened by consent of the defendant, there is no evidence proving or tending to prove that he consented that the notice should be published less frequently than three times a week.

Mr. Justice JAMES, after stating the case, delivered the opinion of the court.

It is contended that the advertisement of the proposed sale should have followed the provisions of the deed of trust for the original advertisement, namely, for three weeks, three times a week, whereas it was published only from the 24th of March to the 9th of April, and consequently the sale having been made without following the provisions of the trust, it was absolutely void and gave no title whereon to support an action of ejectment by the purchaser. A number of authorities were cited by defendant's counsel, to the effect that where the power prescribed in the deed of trust is not followed, the sale is void.

We do not regard that point as material in this case, and there is, therefore, no necessity to decide it, for, whatever may be the law in that respect, we have given weight to a circumstance which takes the case out of that discussion. It appears from the testimony, which is very brief, that the defendant, when the property was about to be sold, called upon one of the trustees, and informed him that he would be able to settle the matter by the 9th of April.

All the evidence offered in the case is set out in the bill of exceptions, and we are, therefore, authorized to treat it as a case stated. We think that, upon the whole case, the suggestion of the defendant was that the trustees should wait until the 9th of April, and then if he did not make the provision for the debt which he hoped to do, the sale should take place on that day. Clearly, where the owner of the property agrees that the advertisement may be for a shorter period than that expressed in the deed, he is estopped from setting up the objection that the provision made in the deed as to advertising was not followed.

{ His defence is an equitable one, which he is allowed to make in an action of ejectment, although the plaintiff must show a legal title. But he has no equitable defence against the plaintiff's taking possession, if he himself authorized the trustees to postpone the sale less than three weeks, and

to advertise accordingly. The judgment must therefore be affirmed.

WILLIAM THOMSON & BRO.

vs.

BENJAMIN F. BEVERIDGE.

{ Decided March 17, 1884.
{ The CHIEF JUSTICE and Justices COX and JAMES sitting.
LAW. No. 7,332.

A. fi. fa. cannot issue on a judgment of this court after twelve years have elapsed since the last proceeding taken to enforce the judgment.

THE CASE is stated in the opinion.

CARUSI & MILLER and FRANCIS MILLER for plaintiff.

LEON TOBRINER for defendant.

Mr. Justice COX delivered the opinion of the court.

The plaintiffs, on the 6th of June, 1870, brought suit in this court against the defendant, and on the 1st of March, 1871, recovered a judgment for \$178, with interest and costs. On the 11th of May, 1871, some two months after the rendition of the judgment a writ of *fi. fa.* was issued, which, on the 11th of July, 1871, was returned *nulla bona*. On the 3d of September, 1883, which was a little more than twelve years after the return of *nulla bona*, at the instance of the plaintiff, continuances were entered upon the docket from the date of the last return up to the date in question, and a new *fi. fa.* was issued on the judgment, which was levied upon the lands of the defendant. He, thereupon, on the 1st of November, 1883, filed his motion to quash the writ, and on the 24th of that month the court below granted the motion, from which action an appeal was taken to this court.

The ruling of the court below was founded upon the act of assembly of Maryland of 1715, chap. 23, sec. 6, which is in the following words:

"No bill, bond, judgment, recognizance, statute merchant or of the staple, or other specialty whatsoever, except such

as shall be taken in the name or for the use of our sovereign lord the king, his heirs and successors, shall be good and pleadable, or admitted in evidence, against any person or persons in this province, after the principal debtor and creditor have been both dead twelve years, or the debt or thing in action above twelve years standing."

On the part of the plaintiff, on the other hand, it is maintained that this is simply a statute of limitations which bars a prosecution of any action upon a judgment after the expiration of twelve years, but does not prevent the entering up of continuances and the issue of new executions after that time.

This is an interesting question of practice, and it is very remarkable that it has never been decided by this court, or by the court of appeals of Maryland, nor has the question ever been disposed of, in this shape, in any of the reported decisions of the old circuit court of this District.

At common law, as we are all well advised, the act of limitations of James I, did not apply either to judgments or specialties, and the defendant had no protection against unseasonable attempts to enforce a judgment or specialty other than the common law presumption of satisfaction after the lapse of twenty years, which presumption, however, was liable to be rebutted.

We are also familiar with the rule that at common law, after the expiration of a year and a day from the date of judgment, if no execution had been issued, none could issue, and the remedy was by an action of debt on the judgment. By virtue of 13 Edward I, chap. 45, a party had a right to revive a judgment by a *sci. fa.*, and have execution upon it. But if he issued the execution within a year and a day, the judgment was good for that time, and he might issue a new execution within the second year and a day, and so on *ad infinitum*, and in that way keep the judgment alive indefinitely, or he might issue his execution within a year and a day, have it returned *nulla bona*, and thereafter enter continuances on the docket from term to term, and take out execution anew. Then the practice came to be that an exe-

cution could issue at any indefinite time after the judgment, when one was originally issued within a year and a day and returned, and the continuances could be entered upon the roll of the court even after the issue of the writ. This condition of the common law obtained in the State of Maryland, and was derived from Maryland by us, qualified, however, by the act of assembly in question.

In the case of *Mulliken vs. Duvall*, 7 Gill & Johnson, 355, it was decided that where an execution had been issued and returned, and some time afterwards, after the expiration of twelve years from the date of the judgment, a *sci. fa.* was issued to revive the judgment, the *sci. fa.* could not be issued after the expiration of the twelve years; that it was barred by the act, and that the twelve years in that case must count from the date of the judgment, notwithstanding a writ had been issued and returned. The court departed from that, however, afterwards, as we shall see.

In the case of *Hazelhurst vs. Morris*, 28 Maryland, 74, it was held that:

“Where a party institutes a suit and the summons proves ineffectual to bring the defendant into court, and is returned by the sheriff, in order to keep the suit alive, the summons must be regularly renewed from term to term, until the defendant is taken. And the plaintiff cannot enter continuances on the record without renewing the writ from term to term, according to the practice of Maryland.”

This decision applied merely to original process, not judicial process, and it is only pertinent to this case, so far as it treats of entering up continuances on the record.

A recent case on the subject is that of the *Hagerstown Bank vs. Thomas et al.*, 35 Maryland, 511, in which it is held, that by issuing a *fi. fa.* within three years from the date of judgment—the term of three years being substituted by a Maryland statute for the one year and a day at common law—and renewing from term to term, the writ never being actually delivered to the sheriff, but simply ordered to lie, in the first instance, and at each succeeding term, the judgment may be kept operative and alive for an indefinite time.

In the old Circuit Court, the earliest case was *Johnson vs. Glover*, 2 Cranch's C. C., 678. In that case, in April, 1823, an execution was issued and returned, and then an *alias fi. fa.* was returned to December, 1824. That was a case in which there was no question about the application of the act of 1715, since the *fi. fa.* was issued within two years of the date of judgment.

In the same volume is found the case of *Riggs & Gaither vs. Barrow*. There the judgment was rendered 14th of January, 1820, and the following December a *fi. fa.* was issued and returned *nulla bona*. Then, October 23, 1823, a *fi. fa.* was issued and returned levied; that is to say, less than two years after the issue of the first *fi. fa.* and its return, another *fi. fa.* was issued and levied. There the court says that:

"Where an execution has been issued within the year and a day, and shall have been returned by the marshal, it is not necessary to renew the execution from year to year, to keep alive the judgment, but the plaintiff may have a new execution at *any time* without a *sci. fa.* But where an execution is ordered to be made out and lie in the clerk's office, and shall not have been delivered to the marshal, and returned, the order for the renewal of the execution must be made within the year and day after the last order for renewal, or the judgment must be revived by *sci. fa.*"

The next case is that of *Ott's Administrator vs. Thomas Murray*, 3 Cranch C. C., 323. There a judgment was entered on the 9th of January, 1824; *fi. fa.* was issued, to lie, returnable at the April term, 1824. In September, 1826, another *fi. fa.* issued, and was returned *nulla bona*. In 1828, two years afterwards, another *fi. fa.* was issued, returnable to the May term of that year. The court there said:

"An execution taken out and ordered to lie in the office is sufficient to keep the judgment alive for one year; and if within the year and day thereafter another execution be taken out in like manner, to lie in the office, it will keep alive the judgment for another year; and so from year to year; and a *fi. fa.* taken out within the last year and a day

and put into the marshal's hands, may be executed, and if returned *nulla bona*, a new execution may *at any time thereafter* be taken out without *sci. fa.*, according to the opinion of the court in *Riggs & Gaither vs. Barrow*, at May term, 1826."

The last case was that of *Digges vs. Eliason*, 4 Cranch C. C., 619. There the judgment was rendered in June, 1820. In December, 1826, the judgment was revived by *sci. fa.* Then, on March 14, 1838, which was a little less than twelve years after the judgment was revived, there was a new *sci. fa.* issued, and the court held that *sci. fa.* issued within twelve years after the judgment on the former *sci. fa.*, though nearly eighteen years after the date of original judgment, was good; so that the plea of the statute of Maryland of 1715 was not sustained.

It will be observed, that in the two next preceding cases the court used the expression, "may at any time thereafter take out a writ." The court was citing the language of the old English books, especially Tidd's Practice. But, of course, the expression is to be restrained to the facts of each particular case. In all these cases the new writ was issued far within the period of limitations. It is not necessary, therefore, to hold this language to mean anything more than that the new writ may be issued at any time while the judgment is still in force and of undisputed validity. It certainly cannot be cited as authority for the position that, after the twelve years, the *fi. fa.* may *at any time* be taken out. In this last case, the court discussed the question whether the period of twelve years is to be computed from the date of judgment, or from some other date, and the conclusion arrived at is announced by Judge Cranch as follows:

"*Twelve years standing* means standing without any proceeding toward enforcing payment." 4 Cranch C. C., 622.

So that if a writ was issued and returned, or if it was renewed from year to year, the twelve years would count from the last act done towards enforcing payment of his judgment, the return in one case and the issue in the other, and would not count, therefore, from the date of judgment.

The present proceeding of *fi. fa.* took place more than twelve years after the date of the last return. It is said that the old circuit court of this District decided such a case in favor of the plaintiff, which is not reported (*Tretler vs. Mayo*), and is brought to our knowledge only through counsel engaged in the case, and from one judge of that court. We are not advised, however, what reasons governed the court in its decision, nor whether the same reasoning governed all the judges, nor how decided they were, and we do not think we ought to be hampered by their opinion, whatever respect we may have for it. It is a new question here, and in the condition of the authorities we have nothing to guide us except the language of the statute and its manifest object. The language is:

"No bill, bond, judgment, recognizance, statute merchant, or of the staple, or other specialty whatsoever, except, &c., shall be good and pleadable, or admitted in evidence, against any person or persons in this province after * * * the debt or thing in action is above twelve years standing."

The first section of the act, like the Statute of Limitations of James I, simply bars the prosecution of an action after the designated time; but this section 6, in relation to bonds, &c., says that they *shall not be good and pleadable or admitted in evidence*. Of course a bill, which means a single bill, or a bond, or any other specialty, which is neither good nor pleadable, nor admissible in evidence, is simply a nullity. The cause of action is entirely destroyed. Can it suggest itself to anybody that a discrimination was intended to be made between a specialty and a judgment which are both dealt with in the same section and the same language? It must be conceded that none is intended, so far as actions are concerned. It is admitted that after the expiration of twelve years—that is, after the judgment shall have been of twelve years standing—no action of debt on it can be brought by the plaintiff, nor any *scd. fa.* be issued upon it. The latter is decided in the case of *Mulliken vs. Duvall*, 7 Gill & Johnson, 355, before referred to. But the plaintiff says, although the judgment is not good and pleadable after the

expiration of this time, it may be good though not pleadable; that it may be good for the purpose of issuing execution upon it; that the act of limitation does not bar executions, but merely bars suits. There is an obvious error in this, at least to the extent to which the proposition is attempted to be maintained. It is admitted and decided that a *sci. fa.* cannot issue after the expiration of twelve years. The very object of *sci. fa.* is to issue execution, and therefore executions, in that form of proceeding, at least, are barred by the statute. Can it be supposed that the legislature, while intending to bar actions of debt and *sci. fa.* on the judgment, yet intentionally omitted the case of entering up continuances and issuing execution without any judicial proceeding?

We hardly think it was intended by the legislature, and we think the plaintiff is in error in supposing that he can get along with his judgment without ever having to plead it or give it in evidence. The defendant may put the plaintiff on the defensive, by an action for trespass, by injunction, by motion to quash. In such cases the judgment would have to be pleaded or offered in evidence. So that, for all practical purposes, if a judgment is not good and pleadable, it is not good for any purpose. Suppose a statute to provide that a mortgage should not be good and pleadable, or admitted in evidence, after the expiration of twenty years, and the defendant should undertake to sell under the mortgage without invoking the aid of the court, would the court heed the suggestion, in answer to a bill for an injunction, that although the mortgage was not good and pleadable, or to be admitted in evidence, yet it could be enforced by sale? We hardly think so.

Our conclusion, therefore, is, that the judgment of the defendant cannot be enforced by the issue of a *fi. fa.*, after twelve years have elapsed from the last proceeding taken to enforce the judgment, and that the court below was right therefore, in sustaining the motion to quash the execution issued in this case.

ASA P. KNIGHT vs. SAMUEL S. BLACKFORD.

LAW. No. 23,069.

{ Decided March 17, 1884.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. **Words** which do not disparage the character of the plaintiff are not actionable, although special damage flow from the uttering of them.
2. **Where** A tells B that C, a Government clerk, had spoken disrespectfully of **his** chief, D, and this coming to the ears of D, he discharges C from office, it *seems* that the damages are too remote to enable C to maintain an action of slander against A.

THE CASE is stated in the opinion.

L. G. HINE for plaintiff.

COOK & COLE for defendant.

Mr. Justice COX delivered the opinion of the court.

This is an action for slander. I will read the declaration :

"The plaintiff sues the defendant for that, whereas, the defendant, before the committing of the grievances by the defendant, as hereinafter stated, had been for several years and was employed as a clerk in the Sixth Auditor's office of the Treasury Department of the United States, at a salary of \$1,600 per annum, and in that capacity had behaved and conducted himself with industry, civility and good temper, and was never guilty of nor until the committing of the said grievances was suspected of incivility or of speaking disrespectfully of his superiors in office.

"By means of which said several premises, the plaintiff had deservedly gained the good opinion of his neighbors, his fellow clerks, and other good and worthy citizens of said District to whom he was known; and had not only gained such good opinion, but had been able to support himself and family by his honest, diligent and faithful service as clerk as aforesaid; yet the defendant, well knowing the premises, but maliciously contriving and falsely and fraudulently intending to injure the plaintiff in his standing as a clerk in the department aforesaid, and to cause him to be removed therefrom, and thereby deprive him of the means of support-

ing himself and family, heretofore, to wit, in and about the month of June, 1880, at the city of Washington, in the District of Columbia, without probable cause, wrongfully maliciously and injuriously spoke and published of and concerning the plaintiff, in a conversation with M. D. Montis J. L. Doty, H. A. Cobaugh and others, the false, scandalous malicious and defamatory words following, that is to say That the plaintiff had said to the defendant, that the honorable John Sherman, then Secretary of the Treasury of the United States, had bought up Sayles J. Bowen, of this District, as a delegate to the Republican National Convention at Chicago, Illinois, in the year 1880, after the said Bower had been chosen such delegate; and further, that the honorable John Sherman, while Secretary of the Treasury, and before the meeting of the said convention, had detailed a clerk in the loan division of the Treasury Department to go to the State of North Carolina for the purpose of organizing 'Sherman Clubs' in that State. 'That Secretary Sherman had sent some of his clerks down south with money to buy delegates to Chicago,' thereby meaning that the plaintiff had accused the honorable John Sherman, Secretary, etc. with having resorted to fraudulent and corrupt means to secure the republican nomination for the Presidency of the United States.

"And the plaintiff further avers, that the defendant, out of personal malice, further contriving and intending to injure him as aforesaid, did, in the conversation aforesaid, maliciously, and without probable cause, utter the false, scandalous, defamatory words, following, that is to say: That the plaintiff had said to him, the defendant, that Mr. James F. Herring, late Deputy Second Auditor of the Treasury Department of the United States, had assessed money contributions on clerks in his office as the price of their promotion, with the knowledge and consent of E. B. French, the Second Auditor of the Secretary, and that Mr. French, while holding said office of Second Auditor, had compelled a clerk in his office to purchase for him, French, a horse and buggy as the price of his, the said clerk's, office; thereby meaning

that the plaintiff had accused Mr. French, then Second Auditor of the Treasury, and his deputy, of corruption in office. **By** means of said malicious, false and defamatory statements, the plaintiff was, on the 15th day of July, 1880, discharged from his said office, to his great damage and injury.

“And the plaintiff further avers, that, after he had been unjustly removed from his office as aforesaid, and being innocent of said charges, he made application to be reinstated, and the defendant, learning of his efforts in that behalf, and not satisfied with having, by means of his false and scandalous statements aforesaid, succeeded in causing his dismissal from said office, but further contriving and maliciously intending to injure him, did, in and about the month of August, 1880, out of personal malice, and with a view to prevent favorable action on the plaintiff's application for reinstatement, reiterate his said false, scandalous and defamatory charges in writing, and filed the same with Mr. Lamphere, then Appointment Clerk of the Treasury Department of the United States, and this had the effect of delaying his reinstatement.

“And the plaintiff further avers, that, after the defendant had filed the written statement aforesaid, and while the plaintiff was endeavoring to be reinstated in his said office, from which, in consequence of said false statements, he had been unjustly removed, the defendant, in conversation with the honorable J. M. McGrew, Sixth Auditor of the Treasury Department of the United States, with the view of preventing favorable action on the plaintiff's application for reinstatement, maliciously, and without probable cause, spoke of and concerning the plaintiff, the false, malicious, scandalous and defamatory words following: “There is one of the clerks in your office (meaning the plaintiff) who is circulating reports about you that will do you harm. I do not want to make any trouble, but I thought you ought to know it. During your sickness last winter, I inquired of him how you were, and he laughed at me, and I asked him why he laughed. He replied: There is nothing ails him (the Hon. J. M. McGrew) but women and bad whiskey;

meaning thereby that the plaintiff had accused the Hon. J. M. McGrew with being a person of inebriate and lascivious habits. By means of said false, scandalous and defamatory words, so spoken as aforesaid, the plaintiff's reinstatement as a clerk aforesaid was further delayed, to his great damage and injury.

"And the plaintiff further avers, that the Hon. John Sherman, Secretary of the Treasury as aforesaid, after considering the written statement filed by the defendant with Mr. Lamphere as aforesaid, and after hearing the plaintiff touching said statements, considered the same were not true, and thereupon, on the 1st day of August, 1881, caused him to be reinstated as a clerk in the Sixth Auditor's office aforesaid."

This declaration was demurred to, and the demurrer was sustained on the following grounds: First, that the language alleged to have been used is not actionable; and, secondly that the damages claimed are too remote. From the decision on the demurrer the plaintiff appealed.

We understand that there are two classes of words that are slanderous; one class consisting of words which are actionable *per se*, and the other, those which are actionable if it be shown that their publication has occasioned special damage to the plaintiff. Words which impute a crime that is punishable criminally, or which assert that a party is unfit for his office or calling in life, or which impute to him some contagious disease that may cause him to be avoided, are all words actionable in themselves. But to say of a man, generally, that he is a rascal, or a scamp, or a dishonest man, is not actionable unless it be proved that some special damage resulted from the use of the language, as for example, that it caused him the loss of employment. If special damage results, then it is necessary for the plaintiff to aver and prove that fact. Actions of that sort are called *per quod* actions.

In this case, it is not claimed that the language was actionable *per se*, but that it was actionable by reason of the special damage alleged to have resulted from its use. I

these *per quod* actions it is not only necessary to show that the language did produce actual damage, but it must appear to be defamatory and scandalous. This rule, which is laid down in the text books, is also well stated in the case of *Terwilliger v. Wands*, 17 N. Y., 60, where the court says:

"There must be some limit to liability for words not actionable *per se*, both as to the words and the kind of damages; and a clear and wise one has been fixed by the law. The words must be defamatory in their nature; and must in fact disparage the character; and this disparagement must be evidenced by some positive loss arising therefrom directly and legitimately as a fair and natural result. In this view of the law, words which do not degrade the character do not injure it and cannot occasion loss. In *Cook's Law of Defamation* (page 24), it is said: 'In order to render the consequence of words spoken special damage, the words must be in themselves disparaging; for if they be innocent the consequence does not follow naturally from the cause.' In *Kelly vs. Partington*, 5 Barn. & Adolph., 645, which was an action for slander, the words in the declaration were: 'She secreted 1*s.* 6*d.* under the till, stating that these are not times to be robbed.' It was alleged as special damage, that by reason of the speaking of the words a third person refused to take the plaintiff into service. The plaintiff recovered one shilling damages, and the defendant obtained a rule nisi for arresting the judgment on the ground that the words, taken in their grammatical sense, were not disparaging to the plaintiff, and, therefore, that no special damage could result from them. Denman, C. J., said: 'The words do not, of necessity, import anything injurious to the plaintiff's character, and we think the judgment must be arrested unless there be something on the face of the declaration from which the court can clearly see that the slanderous matter alleged is injurious to the plaintiff. Where the words are ambiguous, the meaning can be supplied by *inuen-do*; but that is not the case here. The rule for arresting the judgment must therefore be made absolute.' *Littledale, J.*, said: 'I cannot agree that words laudatory of a

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party's conduct would be the subject of an action if they were followed by special damage. They must be defamatory or injurious in their nature. In Comyn's Digest, title 'Action on the Case for Defamation,' D, 730, it is said generally that any words are actionable by which the party has especial damage; but all the examples given in illustration of the rule, are of words defamatory in themselves but not actionable because they do not subject the party to a temporal punishment. In all instances put, the words are injurious to the reputation of the person of whom they were spoken.' Taunton, J., said 'The expression ascribed to the defendant, *These are no times to be robbed*, seems to be saying the times are so bad I must hide my money. If Stenning refused to take the plaintiff into his service on this account, he acted without reasonable cause; and, in order to make the words actionable, they must be such that special damage may be the fair and natural result of them.' Patterson, J., said 'I have always understood that the special damage must be the natural result of the thing done, &c. It is said that the words are actionable because a person, after hearing them chose, in his caprice, to reject the plaintiff as a servant. But if the matter was not in its nature defamatory, the rejection of the plaintiff cannot be considered a natural result of the speaking of the words. To make the speaking of the words wrongful, they must, in their nature, be defamatory. *Vicar vs. Wilcocks*, 8 East, 1.' It necessarily follows from the rule that the words must be disparaging to the character; that the special damage, to give an action, must flow from disparaging it. In the case last cited, the plaintiff actually suffered damage from the defendant's words by their bringing her into disrepute. But the words were not calculated to produce such result, and, therefore, the action would not lie."

This proposition might be further illustrated by supposing that I should go to the Secretary of the Treasury, and say to him that a certain clerk in his department was in affluent circumstances and did not need office, and that I, on the other

hand, did need it; that the Secretary should then turn him out on the strength of that statement, and put me in. That would be a damaging statement on my part, and yet no action for slander could be based upon it. So that the question which meets us on the threshold of the case is, whether the words alleged in this declaration were defamatory and scandalous.

It will be observed that the defendant is not charged with saying anything about the plaintiff's character, but with saying that the plaintiff disparaged somebody else's character; that is to say, that of the Secretary of the Treasury, and that of some of his subordinates. It is not even complained that the defendant accused the plaintiff of falsehood in making these charges against the Secretary and others. If they were true, the plaintiff would have had a right to make them. The declaration does not complain that the defendant even imputed false statements to the plaintiff, much less any more serious moral delinquency. The words, therefore, do not disparage the character of the plaintiff at all, and we cannot conceive how an action can be grounded upon allegations that impute nothing wrong.

Independently of that, there is another difficulty about the case. The allegations, on the strength of which it is said that the plaintiff was removed from office, were not made to the Secretary of the Treasury, but to third persons whose names are given in the declaration, viz., Montis, Doty, Cobaugh and others. Certainly, the representations to them did not lead to the plaintiff's dismissal from office, because they had no power to remove him. There is a gap in the proof somewhere. Some other agency must be brought in to connect the alleged slander with the removal from office. The rule of law is, that the plaintiff can only recover for the direct and immediate consequences of the acts complained of. The dismissal from office could not have been the direct and immediate consequence of the representations made by the defendant to third persons who had no power of removal. Somebody else must have interposed and repeated this alleged slander to the Secretary of the Treasury, which repe-

tition was the immediate and proximate cause of the wrong complained of. The authorities are to the effect that the *repetition* of slander, if that leads to the result, and not the *original* utterance of it, is the *immediate* and proximate cause of the injury. The case I already referred to, *Terwilliger vs. Wanda*, decides that point, and refers to a number of cases in support of it. That would apply to the representations, on the strength of which it is said the plaintiff was removed from office. The other representations, that are said to have delayed his reinstatement in office, which were made directly to the appointment clerk and to the Sixth Auditor, do not come within this rule, but all the representations complained of fall short of being actionable, because they are not defamatory and slanderous in their character.

With these views we are constrained to hold that the demurrer was properly sustained, and judgment must be affirmed.

J. SAYLES BROWN vs. A. P. CLARK ET AL.

LAW. No. 23,244.

{ Decided March 24, 1884.

{ The CHIEF JUSTICE and JUSTICES COX and JAMES sitting.

1. An agreement to pay usury is a mere nullity, and cannot be set up as the consideration of an agreement.
2. Defendant had given a note drawing ten per cent. interest per annum. After the note became due, there was endorsed upon it the following: "It is agreed and understood between the parties to the within note, that it is to run at the rate of five per cent. a month." It was contended that the plaintiff, by agreeing to take usury, had forfeited his right to recover anything but the principal of the note.

Held, That the new agreement to pay usurious interest, though void, did not affect the original contract to pay legal interest, and that the plaintiff was therefore entitled to recover the principal, with accrued interest, at the rate of ten per cent.

THE CASE is stated in the opinion.

RIDDLE, DAVIS & PADGETT for plaintiff.

ALLEN C. CLARK for defendants.

Mr. Justice COX delivered the opinion of the court.

This action was brought upon a promissory note, which reads as follows:

"WASHINGTON, April 1, 1876.

We jointly and severally, thirty days after date, promise to pay to the order of J. Sayles Brown, \$161, payable at 119 Sixth street N. E., value received, with interest at 10 per cent. per annum until paid.

APPLETON P. CLARK.

ELIZABETH C. CLARK.

ALLEN C. CLARK."

Elizabeth C. Clark is the wife of Appleton P. Clark, and Allen C. Clark is the son of Appleton P. Clark. On the note, under date of March 1, 1877, eleven months after its date, there is endorsed the following:

"It is agreed and understood between the parties to the within note, that it is to run at the rate of five per cent. a month.

APPLETON P. CLARK."

This suit was brought on the 14th of November, 1881. Mrs. Clark pleaded coverture, and judgment was given in her favor.

Appleton P. Clark, the father, allowed the judgment to go against him by default. Allen C. Clark, the son, pleads, besides the general issue, that he was an infant, under twenty-one years of age, at the time this note was given, and that the alleged cause of action did not accrue within three years before the commencement of the suit. To this the plaintiff replies a new promise, made within the three years before the commencement of the suit, and after the defendant became of age.

At the trial, two instructions were asked, to the refusal to grant which exceptions were taken.

The first instruction asked was:

"The jury are instructed that the agreement between the plaintiff and Appleton P. Clark, the principal maker, endorsed upon the note sued on, after its maturity, released the defendant Allen C. Clark, and that they should return a verdict in his favor."

The theory of this instruction is, that the principal debtor was Appleton P. Clark, the father, and that the others were sureties, and that this was an agreement to give time without the consent of the sureties, which has the effect in law of discharging the latter. It is, unquestionably, the rule of law, that a *valid* agreement to give time to the principal does discharge the surety, if made without the latter's consent. In this case it will be observed, first, that it is not at all clear what the relation was between these three promisors; whether it was that of principal and surety, or they were all principals. It is true that the money was advanced for the use of the father. That is admitted, and yet the lender may have given credit entirely to the son, or he may have chosen to regard them all as principals, and not have been willing to accept any one as surety. In form, the note is that of three principals, and if it be material, there ought to be something to make it evident that the plaintiff understood that the relation of suretyship existed between Allen and

his father. It does not appear upon the face of the paper at all. Unless it be shown that there was this relation, then the alleged agreement to give time would have no effect, as a covenant not to sue one of several principals does not discharge the others, while a covenant not to sue the principal does discharge the surety. But there was no agreement to give time. The only thing shown in that regard is, that that the plaintiff proposed to the father that he would *forbear pressing for payment thereafter* if interest on the note at the rate of five per cent. per month was paid. He did not agree to forbear for any particular time, or to forbear for a reasonable time. We find in the books that an agreement to forbear generally is not even a consideration for a new promise by the *debtor*. In one case, it was held that, *after verdict*, it would be presumed to be an agreement to forbear for a reasonable time, but the expression, "to forbear for a short time," or "to forbear," generally, was held to be simply void for uncertainty, and not of sufficient value to sustain a new promise. The agreement must be to forbear for a definite time, or, in terms, for a reasonable time, at least. So that this agreement simply to forbear is void for uncertainty. It does not give time to the alleged principal, and, consequently, would not have the effect of discharging the surety.

In addition to that, even if it could be said to give time, the agreement is void under our laws against usury. The statute provides that if parties contract to pay more than ten per cent. interest per annum, even where the contract is in writing, the lender shall forfeit the entire interest. So that, by virtue of this agreement, the lender acquired nothing. Even if the interest had been paid him, it could be recovered back by suit. The lender could not recover a dollar of it. There was no consideration to him for the promise to forbear. On that account, the law would treat this agreement as a mere nullity, and consequently not available, as a defence, to the surety.

The other instruction was that:

"If the jury shall find from the evidence for the plaintiff,

their verdict should be only for the principal of the note.'

The theory of this instruction is that, by virtue of our law to which we have already referred, an agreement for more than legal interest involves the forfeiture of the whole interest. But that means a forfeiture of the whole interest referred to in the agreement. Undoubtedly, no interest could be recovered by virtue of this agreement for further time, in consideration of the payment of five per cent. a month. That is simply void, and leaves the parties where they were before the agreement was made; and before the agreement was made, the plaintiff had a promissory note payable with ten per cent. interest, which was a legal rate of interest. This new invalid agreement does not affect the original one. It leaves that in full force, and under that there had already accrued eleven months' interest on the original promissory note. There is, therefore, error in the prayer, in asking too much, and the court was right in refusing it.

These are all the instructions that were asked, and we are unable to find in the refusal of them any ground for reversing the judgment below. It is therefore affirmed.

CHARLES W. TYLER vs. CHARLES D. GILMORE.

LAW. No. 23,534.

{ Decided March 24, 1884.
{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. Admissions drawn from the plaintiff when on the witness stand in his own behalf, if they go to the foundation of his case, are pertinent to the issue, no matter what the form of the pleadings may be.
2. T., who was tenant *pur autre vie*, leased to G.; pending the lease, *cestui que vie* dies; T. continues collecting the rent, receipting therefor as "agent for the heirs."

Held, That T. could not maintain an action in his own name for rent accruing after the death of *cestui que vie*.

THE CASE is stated in the opinion.

H. O. CLAUGHTON for plaintiff.

S. S. HENKLE and W. K. DUHAMEL for defendant.

Mr. Justice COX delivered the opinion of the court.

This is an action against a tenant, on the covenants of a lease, to recover rent in arrears. The lease was dated October 20, 1876, and was between Charles W. Tyler, of Alexandria, Virginia, trustee for Elizabeth V. Tyler, the wife of Henry B. Tyler, of Fairfax, Virginia, and Charles D. Gilmore. The rent claimed is for the months of September, October, November and December, 1881.

The defendant, Gilmore, interposed two pleas: First, no breach of the covenant to pay rent; and, secondly, that, before the expiration of the term of the lease, viz., April 1, 1879, the lease was by mutual agreement, set aside, abrogated and annulled.

At the trial, there were various exceptions taken. We should have very little difficulty in sustaining all the rulings of the court below but for one question. As has been already stated, the lease was made by Charles W. Tyler, as trustee for his mother, and suit is brought by him in that character. But it appears in one of the bills of exceptions, that the plaintiff testified, upon cross-examination, that the estate which

he held at the time of making the lease, was for the life time of his father, H. B. Tyler, and expired at his death which occurred in 1879, and that all the rents collected subsequent to his death were collected by him as agent for the heirs. The rents sued for here were those which had accrued some two years after 1879, and the defendant made the point that the plaintiff had proved himself out of court that his title had expired, and that the title was in other parties at the time these alleged rents accrued. It is true this evidence, brought out on cross-examination, was given against the objection of the counsel for the plaintiff. The record does not show exactly on what ground the objection rested, but we may presume the objection to have been twofold: First, that the evidence was not pertinent to the issue made by the pleadings in the case; and secondly, that it was evidence as to matters of title and record, a question of law indeed, which could only be made clear by the introduction of the title deeds.

As to the first, it is true that the defendant does not plead the expiration of the plaintiff's title, and it would not have been competent for him to offer this evidence under the pleadings actually filed. Perhaps, if any other witness than the plaintiff had been on the stand under cross-examination it would not have been admissible. But when the plaintiff himself takes the stand to establish his own case, we hold that the law which makes him a competent witness has revolutionized the rules of evidence, that anything he says on the stand is evidence in the case, no matter what the form of the pleadings may be, if it goes to the foundation of his case. If the plaintiff had produced his title deed showing that his estate endured only during the lifetime of his father who had died two or three years before, no court in the world, in the face of such evidence, could allow a verdict to be given for the plaintiff. And, if so, it seems to us that an admission of this sort, drawn from the plaintiff on cross-examination when on the stand in his own behalf, is pertinent to the issue, no matter what may be the form of the pleadings.

In this case, the testimony of the plaintiff may be susceptible of explanation. But, unexplained, it amounts to this, that the plaintiff's title expired months before the rent for which this suit was brought accrued, and this suit ought to have been brought in the name of those whom he calls *the heirs*, and not by himself.

It may be said, perhaps, that the evidence was objected to as parol evidence, and as involving an admission of law; that is to say, whether the plaintiff's title had expired or not. But the admission goes farther than that, and shows not only that his title had expired with his father's life, but that the rent was payable, and had been regularly paid, after his father's death, to parties other than himself, and that he received it as agent for those parties. The admission, we think, is clearly competent.

We have nothing before us but an unqualified admission, as it seems to us, that the plaintiff's title had expired, and therefore the defendant had a right to ask the court to instruct the jury to find for the defendant, and because of the refusal of the court to do so, a new trial must be granted.

FENDALL E. ALEXANDER vs. THE DISTRICT OF COLUMBIA.

LAW. No. 22,071.

{ Decided March 31, 1884.
{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

Where a public sewer is built, without right, upon land, the right of a subsequent purchaser to recover damages in respect to the existence of the sewer upon the land, is limited to such injuries as may have resulted therefrom since the date of the purchase.

THE CASE is stated in the opinion.

I. G. KIMBALL for plaintiff.

FRANCIS MILLER for defendant.

Mr. Justice COX delivered the opinion of the court.

It appears that in August, 1872, the authorities of the District entered upon lot 6, in square No. 72, in the city of Washington, without the consent of the owner, and without any compensation to him, and built on the lot a large public sewer of about ten feet span, for public use. The sewer is now known as Slash run sewer. In 1875, three years afterwards, Mr. Alexander purchased the lot. He complained to the District of the existence of the sewer, and demanded damages for the injuries supposed to result to his property from it, and getting no relief in that way, he brought suit on the 10th of July, 1880, and a stipulation was filed between counsel, admitting the plaintiff's ownership and the date when the sewer was constructed, and making a map attached to the declaration a part of the evidence. It was afterwards stipulated that the cause should be referred to James G. Payne, as auditor, to pass upon the respective rights of the parties, and that his award was to be subject to such exception as to the law, and to the findings of fact therein set forth, as either of the parties might elect to take and file.

Then, some time afterwards, another stipulation was made, to the effect that Mr. Payne, the auditor, should first decide whether the plaintiff was entitled to any compensation at all, and if he should decide that some compensation was due to the plaintiff, the attorneys for each party were to

select another arbitrator who was to act in conjunction with Mr. Payne, and they were to determine the question of **damages** in any way they might desire, and their award on **that point** should not be subject to exceptions.

Mr. Payne proceeded to investigate the questions thus referred to him, and he states the result as follows :

“ The law applicable to this state of facts I find to be as follows: That the plaintiff's ownership extends below the surface, and includes the portion of the soil wherein the sewer is located.”

“ That the defendant has no right to enter upon private land and construct the sewer unless such right be acquired by the consent of the owner or by some lawful proceeding in the nature of condemnation.

“ That the original entry and construction of the sewer being without right, the maintenance of it is equally without right, and is a trespass.

“ That in a case of unlawful interference with the owner's exclusive dominion and ownership over all above and below the surface, and his right to use and enjoy the same at will, no special damage need be alleged or proven. The law presumes that such damage will or may accrue.

“ The plaintiff, in his declaration, counts upon the unlawful use, as well as the taking of the land ; and, upon the facts and law as herein stated, I find the plaintiff entitled to compensation from the defendant.”

Thereupon, Brooke Mackall and David E. McComb were selected by the parties, respectively, as additional arbitrators, and they made an award on the 21st of February, 1883, in which Mr. Payne and Mr. McComb united, saying :

“ The undersigned, a majority of the arbitrators appointed in this cause by stipulation of the parties, and by order of the court, having viewed the premises known and described in this proceeding as lot 6, in square 72, in the city of Washington, &c., and having investigated the question of damages, and having determined and considered that the building and construction of the said sewer is an injury to the said lot, permanent and lasting in its character and du-

ration, and that the damages awarded in this proceeding are and shall be taken as full compensation to the plaintiff the owner of said lot, for the injury arising from the *construction and maintenance* of the said sewer, do hereby determine and award that the amount due from the defendant the District of Columbia, to the plaintiff, the said Fendall E. Alexander, by reason of the premises, is \$1,700.

Then the attorney for the District filed an exception to the finding of the referee, Payne, for the reason that he decides that the plaintiff is entitled to recover for the original construction of the sewer as well as for its maintenance. He claims that, the sewer having been constructed in August 1872, and the plaintiff not having become the owner of the property until August, 1875, the only damages that could be recovered by him, in this action, would be such as might be due him for maintenance of the sewer from the time he purchased up to the time of bringing this action.

It is conceded by both parties that the plaintiff is not entitled to recover for damages growing out of the original construction and existence of the sewer up to the time of his purchase, and the only question before us is whether the award of the referee does bear the construction put upon it by the excepting party. Now the substance of the award is that and Mr. Payne lays it down as the law, first, that the defendant has no right to enter upon private lands and construct a sewer, unless such right be acquired by the consent of the owner, or by some lawful proceeding in the nature of condemnation; and, next, that the original construction of the sewer being without right, the maintenance of it is equally without right and is a trespass. This last proposition is printed in italics in the record, the idea being that this was the proposition established by the award, and that the other proposition is only preliminary. But they are both stated with equal emphasis; first, that the District authorities had no right to enter upon the land; and, second, that they had no right to maintain the sewer, and the result of the finding is:

“The plaintiff, in his declaration, counts upon the unlaw-

ful use as well as the taking of the land, and upon the facts and law as herein stated, I find the plaintiff entitled to compensation from the defendant."

We think that only bears one interpretation, and that is that the referee gives the award for the original entry on the land and maintenance of it since, and the award made by him and the assistant arbitrator evidently proceeds precisely on the same theory; they having determined that the building and construction of the sewer is an injury to the lot, permanent in its character and duration, and that the damages awarded in this proceeding are to be for the full injury caused by the construction and maintenance of the sewer. This is equally emphatic with the original award, and covers all damages, we think, of the original construction, and the whole injury supposed to have been done to the property up to the time of the bringing of this action. And we are confirmed in this view by the amount which was awarded, because there is no evidence that during the ownership of this property by the plaintiff any special damages were suffered at all. He has had it five years, and it does not appear that any particular injury has been caused from it as a continuing or maintained nuisance. The \$1,700 is clearly a compensation intended for the entire injury resulting from the construction and the permanent maintenance of the sewer there.

The award seems also to contemplate giving this sum for the permanent right to maintain a sewer there, just precisely as if the lands had been condemned by the District authorities. That is conceded in the argument by the plaintiff himself, and in that respect the award goes entirely beyond the scope of the stipulation of the parties. It may be that it would be better for the District to pay something for this right than to be subject to constant suits for maintaining this nuisance, if it is a nuisance; but we can only go by the stipulation of the parties, and we think that the award goes beyond it, and that the court was right in sustaining the exception to the award, in favor of the District.

THOMAS O'DAY vs. LOUIS VANSANT.

LAW. No. 22,969.

{ Decided March 31, 1884.
 { The CHIEF JUSTICE and Justices COX and JAMES sitting.

At a sale of real estate, made by trustees in foreclosure of a trust given to secure the payment of a debt, the party bidding did not know the metes and bounds of the property sold; but it was held, that he was bound by his bid and could not refuse to accept the property; and therefore less was conveyed to him than was sold, he was entitled to a conveyance of the remainder, even though he had been conveyed all that he supposed he was bidding for; and that this latter conveyance may be by a second deed conveying only the part not conveyed by the first.

THE CASE is stated in the opinion.

FRED. W. JONES for plaintiff.

HUGH T. TAGGART and R. P. JACKSON for defendant.

Mr. Justice COX delivered the opinion of the court.

The case of Thomas O'Day against Louis Vansant was an action of ejectment which has come to us on exception taken to the instructions of the court below. There is only one question in the case, and that may be disposed of briefly, and it is not necessary to refer to more than one of the titles which were resorted to in making out the chain title.

The suit is brought for a portion of lot numbered thirteen in square thirty-seven, which is described in the record as fronting on the south side of M street north. There were several subdivisions running back between parallel lines, of width mentioned, to the rear of the lot, with the exception, that the westernmost of these subdivisions did not extend as far south as the others, and in order to give access to an alley in the rear of the lot, a portion of the middle subdivision, near its southern end, was cut off and attached to it. So that it was irregular in shape, fronting seventeen feet on one street, and running south a certain distance, and then east twelve feet into the midst of the middle subdivision, and then south to an alley, etc.

Elizabeth Leonard, by deed dated February 16th, 1877, con-

veyed the westernmost portion or subdivision aforesaid, according to this description of an irregular shape, to Cassin and Gordon, as trustees to secure the payment of a debt. They afterwards advertised the property precisely as it was described in the deed, and made sale of it on the 11th of March, 1880. This plaintiff, Thomas O'Day, became the purchaser at that sale. O'Day was of the impression that he was buying less than the amount offered at the sale. He thought that he was purchasing only a lot seventeen feet in width, and running back, of one uniform width, seventy-five feet, and he caused the deed to be prepared by his own attorney, which only embraced that much land. Some time afterwards, he discovered that the advertisement embraced this additional strip before mentioned, and he applied to the trustees and received from them a deed for that additional strip, and he brings this suit to recover it.

At the trial below, the defendant by his counsel asked the court to instruct the jury that:

"If the jury find from the evidence that the plaintiff, O'Day, supposed that the trustees were selling, and bid at the sale the sum of \$960 for a portion only of the land covered by the deed of trust to Cassin and Gordon, fronting seventeen feet on M street by a depth of seventy-five feet, that upon payment of said sum by him he tendered to the said trustees for execution a deed conveying to him, the said O'Day, the said seventeen feet by seventy-five feet, and that the said trustees executed and delivered to him, the said plaintiff, the said deed, and that the said O'Day accepted the same, thereupon entered into possession of the said seventeen feet by seventy-five feet, and has ever since held possession of the same; and if they further find that the said sum of nine hundred and fifty dollars was more than sufficient, and did in fact pay and satisfy the debt to the said building association, and all costs and charges incident to the sale, then their verdict must be for the defendant."

In other words, the instruction asked was, that if he thought he was buying only part of the ground that was actually offered for sale, he was not entitled to apply for

a deed afterwards on which he might claim to recover the rest.

We do not understand that to be the law. Certain property was offered for sale; whether the party attending the sale knew the metes and bounds or not, he was bound by his bid at that sale and could not refuse to accept the property, and is certainly entitled to the whole amount sold, and when he discovered the mistake in his first deed he had a right to apply to the trustees and receive a second deed. The instruction was therefore rightly refused.

Then the court went on and instructed the jury that if they should find from the whole evidence that the trustees advertised the whole of the property for sale, it was competent for them to convey by the two deeds; in other words, simply saying that if the trustees sold the whole property, and made a deed for only a part, they were authorized to make a deed for the balance afterwards. We do not see any objection to that instruction.

These are the only two instructions that were the subject of exceptions. The jury found for the plaintiff, and the judgment below is affirmed.



SOLOMON J. FAGUE vs. WILLIAM W. CORCORAN.

LAW. No. 23,168.

{ Decided March 31, 1884.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. In the correction and revision of erroneous special assessments for street improvements, the District Commissioners had adopted a general rule whereby a certain class, known as "Henry Cooke" assessments were uniformly reduced two-thirds of the original sum. F., who was attorney for C. in the prosecution of claims for the reduction of over assessments upon C.'s property, included in his bill for services a charge of ten per cent. upon the amount saved to C. by the reduction of these "Henry Cooke" assessments. *Held*, That unless there was some proof of services rendered by F. in effecting this reduction, he would not be entitled to recover this item of his bill.
2. Nor can recovery be had on a like charge for reductions claimed to have been effected on certain assessments, where an act of Congress is required before any credits for such reduction can be realized and no such act has been passed.
3. Where, also, certain assessments had been cancelled by a general order of the Commissioners, compensation cannot be had on account of the cancellation without showing that the plaintiff's services were directed to securing it.
4. When the declaration consists of the common counts, with a bill of particulars annexed, no recovery can be had for services not included among the items of charges contained in the bill of particulars. The latter defines the application of the common counts, and is a part of the pleading under our system. It apprises the defendant what it is the plaintiff expects to recover on, and if the bill contains no such item, no recovery can be had, even if the services were in fact rendered.
5. But the court may, on a new trial being granted, allow an amendment of the bill of particulars, so as to include such a charge.

STATEMENT OF THE CASE.

The plaintiff brought this action to recover of the defendant \$3,356.43, under the following declaration and bill of particulars:

"The plaintiff sues the defendant for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant, and for work done and material provided by the plaintiff for the defendant at his request, and for money lent by the plaintiff to the defendant; and for money paid by the plaintiff for the defendant at his request; and for money received by the defendant for

the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on accounts stated between them; and the plaintiff claims \$53,356.43, with interest from the 15th day of September, A. D. 1881, according to the particulars of demand hereto annexed.

"2d. The plaintiff also sues the defendant for a further sum of indebtedness due the plaintiff from the defendant, to wit, the sum of \$3,356.43, with interest from the 15th day of September, A. D. 1881, for the work, labor, care and diligence and attendance of the plaintiff by the plaintiff done and performed and bestowed as the agent of and for the defendant, at his special instance and request, evidenced by the certain powers of attorney to defendant, and by verbal requests made by defendant to and of plaintiff from time to time to so act for him the said defendant, in and about preparing, presenting, filing and prosecuting before the Board of Audit of said District, and before the Board of Commissioners of said District, defendant's claims for damages to defendant's real property, and to real property in which defendant was interested, for old material taken from in front of defendant's real property and for erroneous or excessive charges in certain special assessments against said property of defendant, and against said property in which defendant was interested; and, further, for certain commissions and awards upon the sums awarded or allowed by said boards in, about and concerning said claims so prepared, presented, filed and prosecuted aforesaid; and he, the said defendant, faithfully promises the said plaintiff to pay him so much money as he therefrom reasonably deserved to have of the said defendant, and which he, the said defendant, should be thereunto afterwards requested. And the plaintiff avers that he therefore reasonably deserved to have of the said defendant the said sum \$3,356.43, the same being ten per cent. of the award and allowances aforesaid made by said boards in respect to said claims aforesaid prepared, presented, filed and prosecuted aforesaid in respect to the property mentioned and set forth in the particulars of demand in respect to said allowances

or awards hereto annexed, and hereby made part hereof the said sum of \$3,356.43, being the net amount of said ten per cent. after crediting said defendant with certain payments thereon on account thereof made by defendant from time to time, and as set forth in said particulars of demand. Nevertheless, the said defendant, not regarding his several promises and undertakings in and about the premises, but contriving and fraudulently intending, craftily and subtly, to deceive and defraud the plaintiff in this behalf, has not as yet paid said sum of \$3,356.43, or any part thereof, although said defendant afterwards, to wit, on the 15th day of September, A. D. 1881, was requested by said plaintiff so to do; but the said defendant to pay the same has hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of the said plaintiff, of \$3,356.43, with interest thereon from the 15th day of September, A. D. 1881; and therefore he brings suit.

Bill of Particulars.

Total reductions by Commissioners.....	\$30,811 91
Balance Louise Home ordered by act of Congress.	6,687 63
Am't damage before Board of Audit on Lot 10, sq.	400 00
	\$37,899 54

W. W. Corcoran to S. J. Fague, *Dr.*:

To 37,899.54 com'n at 10 p. ct.	\$3,789 95
Writing up statement and furnishing data sq.	
212, and so. of 212.....	50 00
	\$3,839 54

Cr.

By cash at various times.....	450 00
Balance due.....	\$3,389 54
By error in sq. 575, lot 9.....	33 72
	\$3,355 82

WASHINGTON, D. C., *Sept. 6,*
W. W. Corcoran to Solomon J. Fague, *Dr.:*

To services before the Board of Audit in filing bill prosecuting same continuously before the Commission the Dist. of Columbia.

Am't reductions, \$37,499.54.....	\$3,7
Writing up statement in reference to action of Board of Audit on sqr. 212, and south of said square between 14th and 15th streets.....	
Damages on lot 10, sqr. 196, \$400.....	
	<hr/> \$3,8

Cr.

By cash—

Oct. 30, '75.....	\$100 00
Feb. 26, '76.....	50 00
Oct. 15, '78.....	100 00
Nov. 23, '78.....	50 00
Jan'y 7, '79.....	50 00
Jan'y 28, '81.....	100 00
	<hr/> \$4

Bal. due.....	\$3,3
By error in sqr. 575, lot 9, \$337.18.....	

Bal.....	\$3,3
Int. on balance from Sept. 15, 1881.	

To this declaration the plaintiff pleaded, to the count, "*nil debet*," and to the second, "*non assun* Issue being joined, the parties went to trial. Where the plaintiff testified, *inter alia*, to his having been given the defendant a power of attorney, dated February 18, authorizing plaintiff—

"To prosecute to final settlement, subject to my or all claims that I have or may have against the late of Public Works for damages and compensation on said improvements now pending before the Board of Audit that may hereafter be presented to said board." on the 12th of November, 1878, the defendant, at the request of the plaintiff, notified the Commissioners of the D.

as follows: "Solomon J. Fague is my authorized attorney, to prosecute my claims for drawbacks for old material or over assessments on all my property in the District of Columbia, and also on Louise Home property." That the rate of compensation agreed on under the first power of attorney was "ten per centum of the amount that may be recovered or paid to the respective claimants." That plaintiff made measurements of streets and estimates of damages, and for old material, and filed claims in behalf of defendant before the Board of Audit, sworn to by the defendant. That the claims filed before said board for defendant for damages done to his property amounted to between \$30,000 and \$40,000, of which the sum of \$400 was allowed before said board was abolished by act of Congress, approved March 14, 1876; and that claims filed by plaintiff for defendant for drawbacks for old material amounted to the sum of \$33,000, but plaintiff did not know the amount recovered. That after the passage of the act of Congress, entitled, "An act to provide for the revision and correction of assessments for special improvements in the District of Columbia, and for other purposes," approved June 19, 1878, plaintiff, as attorney for defendant, filed with the Commissioners of the District a claim or complaint under said act of Congress, for the revision and correction of assessments upon property belonging to defendant, said claim or complaint also showing the items of real estate owned by the defendant in the District. That in the matter of the abatement of taxation upon the "Louise Home" property, plaintiff, pursuant to the directions of defendant, presented a bill to the Congress of the United States for the exemption of said institution from taxation, which bill, after amendment, was passed. That plaintiff filed no affidavits under said act of Congress providing for revision, in his opinion none being necessary under the law, but made special statements orally or in writing. That the revision of the "Henry D. Cooke" assessments consisted in striking off two-thirds of the sum of the assessments. That to realize the credits on the "Emery" assessments an act must be passed by Congress,

and that an act of Congress was necessary to secure where payments were made of special assessments after 19th, 1878, and before revision.

That from the time of the close of the Board of March 14, 1876, to December, 1877, plaintiff had been constantly working for the defendant to secure reduction of assessments.

The testimony for plaintiff being closed, the defendant offered the testimony of the clerk in charge of the assessment division, who testified that certain rules of the government of his office were passed and promulgated by the Commissioners on the 19th of July, 1878; that the section of said rules provides as follows: "The revision of the special assessments will be based on the official records of the District, but where these are defective or insufficient evidence for claimants for drawbacks will be accepted only in the form of an affidavit." * * * * "For a person interested in any special assessment can obtain all information in respect to it without intervention of any other person by application at the office of the clerk in charge of the assessment division, room 6, District Office."

That these rules were relied on and followed in the revision of the assessments; that by reason of the large number of complaints filed, no attention was paid to them, and no revisions were made whether complaints were filed or not. Specific errors were rarely given in complaints. The official records of the District of Columbia furnished the evidence relied on, and if these proved defective or insufficient, then evidence was received under the rule.

That the special cases filed by plaintiff for defendant reference mainly to squares 186 and 200 in the city of Washington, in which the reductions, as shown from the records, amounted to the sum of \$2,352.02; that plaintiff filed special cases for triangular lots, in which detailed information was given and reductions allowed, which formed rules for other cases.

That the revision of the assessments against the "Home" was made by the Commissioners prior to the

sage of the acts of Congress providing for revision of assessments, but subsequent, in point of time, to measurements thereof made by plaintiff on Massachusetts avenue, from New Jersey avenue to Boundary, and reported to Congress by the Commissioners to show the necessity for such acts, and that after the passage of said acts no material change was made in said revision.

That certain assessments, which were suspended in April, 1877, were first suspended at the request of the officer in charge of special assessments, and were annulled after the passage of the acts providing for revision, because the work had not been fully completed.

That where payments of assessments had been made after June 19, 1878, and before revision, no drawback could issue or credit be allowed; but this was done in one case.

"That the "Henry D. Cooke" assessments had been made prior to the passage of the acts providing for revision of assessments in the District of Columbia, and that the sheets containing such assessments had been in the office of the collector of taxes of said District, and were ordered into custody of witness about June 19, 1878, the result of the revision being to return two-thirds of the assessment to the taxpayer, being a mere arithmetical calculation.

That in the case of "Emery assessments" no drawbacks or credits could be issued under the law. Plaintiff was diligent in the office with oral discussion, which did not influence action in the revision; but these discussions resulted in some cases in overruling the action of his office. The defendant also offered the testimony of the officer in charge of said special assessment division, that the said rules passed and promulgated as aforesaid were acted under in said division, and that the official records furnished all the evidence for revision, except where insufficient or defective, when evidence under the rule was required.

That witness had examined the particulars of demand filed with the declaration in this cause, and that of the sum claimed to have been made by way of reduction, \$4,339.20 is claimed for what are known as "Henry D. Cooke

revisions;" \$1,697.87 is claimed for what are known "Emery assessments;" \$646.63 is claimed for reduction assessments paid before revision and after June 19, 1877; \$329.22 is claimed for annulment of assessments paid before revision and after June 19, 1878; \$2,436.83 is claimed assessments suspended in April, 1877, and finally annulled after June 19, 1878, and before payments; \$3,193.20 is claimed for reductions made in assessments on the "Low Home" by the Commissioners of the District of Columbia; \$6,687.63 is claimed to have been exempted by act of Congress; \$5,823.56 is claimed as a difference between the interest charged on the unrevised assessment and the interest charged on the revised assessment.

The testimony being closed, the defendant, among other prayers, requested the court to grant the following:

Sixth Prayer: "If the jury find from the evidence that the Commissioners, in revising and correcting erroneous or excessive charges in respect to unpaid assessments promulgated, and, in fact, acted upon the rule, that when the Board of Public Works had executed contracts made by the corporation of Washington, and had assessed the entire cost of the improvements embraced in such contracts upon private property, only one-third of such cost should be assessed against private property; and if the jury further find that this rule and the promulgation thereof were well known to the plaintiff before he performed any services for the defendant, touching the revision or correction of when the assessments are called the "Cooke assessments," and that the revision of the said "Cooke assessments" upon the property of the defendant, consisted merely in the process of striking two-thirds of the amount of the original assessments, shown upon the records of the District, charged against the said property, and that the said revision was in fact made prior to the passage of the acts of Congress, approved June 19, 1878, and July 27, 1879, providing for the revision of special assessments of the District of Columbia, then the jury are instructed as matter of law that this reduction of such assessments by the Commissioners, in conformity

their general rule, cannot, in the absence of proof of services contributed by the plaintiff to effect the reduction, be made the ground of recovery by him against the defendant."

Eighth Prayer: "If the jury believe from the evidence that of the amount of reductions claimed to have been effected by the said plaintiff the sum of \$1,697.87, or other sum is claimed by reason of what is known as 'Emery assessments,' the jury are instructed as a matter of law, that no authority exists for the issuance of drawbacks or other credits for such reductions, and plaintiff's claim for such reductions must be disallowed."

Eleventh Prayer: "If the jury find from the evidence that, of the reductions claimed to have been effected by the plaintiff upon the property of the defendant the sum of \$2,436.83 is claimed by reason of the cancellation before payment of special assessments for certain grading which was commenced prior to April 10, 1877, but which was not completed at the time of such cancellation; and if the jury further find that on April 10, 1877, all assessments for grading which was not then completed were suspended throughout the District by a general order of the Commissioners, which said general order was made for the first time at the instance of the engineer commissioner of the District of Columbia, and that during such suspension, and by the like order, and subsequent to July 27, 1879, all assessments for grading throughout the District were taken up for examination in fixed and regular turns by streets and avenues, and by the like order, directed to be completely cancelled, whether the grading at the time of such examination was found to be uncompleted, then the jury are instructed, as matter of law, that the plaintiff can recover no compensation on account of such cancellation, without showing affirmatively that his services were directed to securing it."

Nineteenth Prayer: "For any services by the plaintiff, performed before Congress or any committee or member thereof, in securing or providing legislation in respect to special assessments in the District, the plaintiff cannot recover in this action."

All of which prayers the court refused to grant, and exceptions being taken, the case came to the General Term. It should be here observed, that only so much of the testimony and of the rulings of the court as have reference to the points decided by the court in General Term are given in the foregoing statement of the case.

H. O. & R. CLAUGHTON and F. E. ALEXANDER for plaintiff.

C. M. MATTHEWS and JOHN SELDEN for defendant:

Of the reductions claimed in the bill of particulars to have been effected by the plaintiff, the sum of \$4,339.20, upon which the plaintiff claimed a commission of ten per cent., was claimed upon what is known as the "Henry D. Cooke revision."

This class of assessments, though made subsequent to the act of Congress of February 21, 1871, had been charged in their entirety upon private property, notwithstanding that, by the 37th section of that enactment, there could be rightfully assessed against such property only a "reasonable proportion of the costs of the improvement, not exceeding one-third of such cost."

But by act of legislative assembly, December 19, 1871, it had been provided that all improvements made after the passage of the act of Congress of February 21, 1871, should "be assessed in accordance with the requirements of the 37th section of that act."

The "Henry D. Cooke assessments" had lain in the office of the collector of taxes for the District, and were ordered into the custody of the clerk of the special assessment division of the District about the 19th day of June, 1878.

It was admitted by the plaintiff, at the trial, that the revision of these assessments "consisted in striking off two-thirds of the sum of the assessments."

The revising officer of these assessments declared that the process of revision was "a mere arithmetical calculation."

The defendant was entitled to have the jury informed

that under the provisions of the act of the legislative assembly of December 19, 1871, he became lawfully entitled to drawbacks upon the Henry D. Cooke assessments, upon the payment thereof.

This was an element fairly to be considered by the jury, in determining the nature and value of the services performed by the plaintiff in relation to those assessments.

This instruction the court declined to give.

As to the Emery assessments, there was evidence tending to show that of the amount of reductions in assessments claimed in the bill of particulars to have been effected by the plaintiff, the sum of \$1,697.87 was claimed on account of reduction in what were known as the Emery assessments.

The act of Congress of June 19, 1878, authorized the revision of *unpaid* assessments only, and it was only in case of assessments that were *paid* before June 19, 1878, that revisions or corrections were authorized by the act of July 27, 1879.

There was also evidence tending to show that upon the Emery assessments no drawbacks or credits could be issued under existing laws, and that, as was conceded by plaintiff, an act of Congress was required to realize such credits.

The defendant desired the court to instruct the jury that, if they believed what the evidence thus tended to show, there was no authority for the issuance of drawbacks or credits for reductions upon the Emery assessments, and that the claim of the plaintiff for effecting reductions upon those assessments must be disallowed.

This instruction the court refused to give.

It is clear there existed no authority of law to make these reductions.

And it requires an act of Congress, not only to ratify the reductions thus made, but to make them available by way of drawbacks or credit to the defendant.

Congress may never act upon the subject.

The defendant has derived no benefit whatever from the

alleged services of the plaintiff in respect of these assessments.

The contingency upon which the plaintiff was entitled to compensation, if at all, in this particular, has not happened.

And the action as to those services is, at least, premature.

The 19th prayer of the defendant was directed to the alleged services of the plaintiff in procuring general legislation upon the subject of special assessments in the District.

In that prayer, the court was requested to instruct the jury that the plaintiff could not recover for any services performed before Congress, or any committee or member thereof in securing or providing legislation in respect to special assessments in the District.

Services for procuring general legislation in respect to assessments in the District, could not be given in evidence under the first count of the declaration, since nothing was provable under that count beyond the items embraced in the bill of particulars annexed to such count, and the bill of particulars contains no claim for any such services.

The object of a bill of particulars is to apprise the defendant of what he must be prepared to meet at the trial, and the bill can furnish no such information if the plaintiff be not bound by it. 4 Rob. Prac., 899; *De Sobry vs. De Lais-trey*, 2 Har. & J., 191.

Nor could any recovery for such services be had under the second count of the declaration, since that count only embraces services claimed to have been rendered before the Board of Audit and the Commissioners of the District.

It may be said, however, that there was no allowance made by the jury to the plaintiff for services in procuring general legislation as to special assessments in the District of Columbia.

But it is impossible to affirm with certainty that such services were unconsidered by the jury in reaching their ultimate conclusion upon the case. And if those services formed an element in determining the verdict, they entered, of necessity, into the recovery.

Mr. Justice JAMES delivered the opinion of the court.

The court has decided to send this case back for a new trial. Some nineteen prayers were requested of the court below, of which two were granted and seventeen refused. Of these, we think the sixth, eighth, eleventh and nineteenth should have been granted. The sixth prayer relates to what are known as the "Cooke assessments," in which the whole cost of a street improvement had been assessed upon the adjoining property, instead of only one-third of the cost. And the prayer in substance was that if the Commissioners had adopted a general rule whereby all such assessments were cut down two-thirds then the plaintiff could not recover for this reduction, unless there was some proof that he contributed some specific service to that end. We think it plain that unless there was some proof of services rendered by the plaintiff in effecting this reduction of two-thirds of the assessment, he would not be entitled to recover for that item of his bill. The prayer was quite applicable to the issue involved, and should have been granted.

The eighth prayer related to the plaintiff's claim for effecting reductions in what is known as the "Emery assessments," and the court was requested to instruct the jury that if, as a matter of law, no provision existed for the issuance of drawbacks or other credits for such reductions, the plaintiff's claim for obtaining such reductions must be disallowed. We think this prayer should also have been granted. So, too, the eleventh prayer, in relation to certain grading which had been commenced, afterwards discontinued and the assessments cancelled by a general order of the Commissioners, the court was requested to instruct the jury that the plaintiff could not recover any compensation on account of this cancellation of the assessment without showing that his services were directed to securing it. This prayer rests upon the same principle of law governing the sixth prayer, and should have been granted.

Finally, in prayer nineteen, the court was asked, but refused, to instruct the jury that for any services performed by

the plaintiff before Congress, or any committee or member thereof, in securing or providing legislation in respect to special assessments on the defendant's property, the plaintiff cannot recover. There is a special reason in this case why this prayer should have been granted. The second count of the declaration had no reference to this claim, so that it could only be recovered, if at all, under the common counts, with the bill of particulars annexed. But, in the bill of particulars, there is no claim for any such service. The bill of particulars defines the application of the common counts, and is a part of the pleading under our system. It apprises the defendant what it is the plaintiff expects to recover on, and if there is no claim made in the bill of particulars for services before a committee of Congress in procuring this general legislation, it follows that no recovery can be had for such services, even if they had been rendered. This item should, therefore, have been disallowed. When the case goes back, the court below may allow an amendment of the bill of particulars, so as to add a charge for services of that kind, if the plaintiff wishes to include it in his recovery.

GEORGE SIMMONS *vs.* CHARLES POMEROY.

LAW. No. 23,614.

{ Decided March 31, 1884.
 { The CHIEF JUSTICE and Justices COX and JAMES sitting.

re one has placed himself in a position which will disable him from
 rming his part of a contract, he cannot sue the other party to the
 act for a failure to perform his part of it.

reed to convey certain lands to L. in exchange for a certain house.
 wards L., for a consideration paid him by S., assigned the contract to
 d conveyed him the house, the latter assuming to convey the same to
 receiving from him the title to the lands: S., however, finding the
 to the house had returned it to L.; P. then refused to convey the
 , and upon suit brought by S. against him for breach of contract, it

hat S. was bound to be ready to convey the house as soon as
 adered him the land, but that as he had put it out of his power to
 y the house by returning it to L., he had already broken his part of
 greement and was not in a condition to sue for the breach on the part

STATEMENT OF THE CASE.

s was an action of assumpsit to recover damages for
 1 of contract, the plaintiff alleging that defendant,
 onsideration paid to one A. Langdon, agreed to sell to
 iff 800 acres of Florida lands, and deliver patents for

: general issue was pleaded, and on the trial plaintiff
 d evidence showing that on or about the 2d of April,
 plaintiff and defendant entered into an agreement in
 ig, as follows:

or value received, I hereby agree to sell to George
 onseight hundred acres of land in Florida; the patent
 e same to be transferred to Simmons as soon as re-
 l by me; and I hereby consent to have A. Langdon
 y to Simmons the titles to house No. 1743 Eleventh
 n. w. (subject to the incumbrance now on it), the
 to be held by Simmons as collateral security for the
 tion of the title to the Florida lands, and, when the

title is so perfected, Simmons to return to me the title to the house No. 1743 Eleventh street.

"CHARLES POMEROY.

"GEORGE SIMMONS.

"Witness:

"A. LANGDON."

He further testifies that before the execution of the above agreement, he had entered into a contract to sell to Andrew Langdon certain books, furniture and fixtures contained in house No. 330 Four-and-a-half street, in the city of Washington, in consideration of which Langdon was to convey him forty acres of land in Florida, Langdon to have possession at once of the books.

After the execution of the agreement with Langdon, the latter informed Simmons that he did not, himself, possess the title to the Florida lands, but that he, Langdon, had an agreement with the defendant Pomeroy, by which Pomeroy was to convey eight hundred acres of Florida lands to him, Langdon, as soon as he, Pomeroy, would obtain patents therefor, which he was about to do; and he asked plaintiff if he would take a contract from Pomeroy for the transfer of the land, to which plaintiff assented.

The plaintiff and Langdon then went to Langdon's office and met Pomeroy; and, while the books were still in the possession of the plaintiff, the agreement, which is the subject of this suit, was entered into in place of the one with Langdon.

Upon the execution of the agreement with Pomeroy, the plaintiff delivered the books to Langdon.

Plaintiff also testified that the inducement which led him to deliver the books to Langdon was the promise of Pomeroy to transfer the patents to Florida lands. That he was informed, both by Langdon and Pomeroy, that it would be but a short time before they were obtained, but no definite time could be stated. That Langdon and Pomeroy both told him that they thought the Florida land would be worth about \$2.50 per acre.

The plaintiff further offered evidence tending to show that Langdon delivered a deed to plaintiff, which was never recorded, for a house on Eleventh street, as collateral security for the transfer of the patents of the Florida lands to him by Pomeroy. That the plaintiff thereafter investigated the title to the Eleventh street house, and found it incumbered to nearly its full value, and was worthless to him. Whereupon he returned the title deeds to Langdon, and has now no title to the premises.

The plaintiff further offered evidence tending to prove that the patents to the Florida land had never been transferred to him; that he had written to Pomeroy about the lands, asking a transfer of the same previous to the bringing of this suit, but had heard nothing from him.

The plaintiff then rested. Whereupon the defendant prayed the court to instruct the jury that, admitting all the testimony adduced on the part of the plaintiff to be true, as a matter of law the plaintiff is not entitled to recover of the defendant, which instruction the court gave. To which ruling the plaintiff excepted, and the case then came to the General Term on a motion for a new trial.

A. A. LIPSCOMB and FILLMORE BEALL for plaintiff.

The rule of law is, beyond question, that a benefit to a third person at the request of the promissor is a sufficient consideration for the promise. Chitty on Contracts, 28.

The delivery of the books to Langdon, and the substitution of the new agreement with the defendant in place of the one with Langdon, is such a benefit.

The fact that the plaintiff took collateral security, even if it had not been worthless, affords no reason to defeat his right of action here. Chitty on Pleading, vol. 1, p. 118, 16th edition; Snow *vs.* Thomaston Bank, 19 Maine, 269.

The contention of the defendant is, that the plaintiff was properly defeated, because the testimony disclosed that he had returned the title to the Eleventh street house to Langdon, and therefore the defendant had a right to consider the contract rescinded, and to refuse to transfer the lands.

Upon this point plaintiff suggests:

First. That the agreement declares that the title to the Eleventh street house is "to be held by Simmons as collateral security for the perfection of the title to the Florida lands, and when the title is so perfected," Simmons was to return the title to the house to Pomeroy, and the proof shows that not only was the title to the Florida lands not perfected, but no offer was made by Pomeroy to transfer even the patents therefor to Simmons.

Second. If the evidence had shown Pomeroy willing and ready to transfer the patents, and perfect the title to the Florida lands, the inability and failure of Simmons to return to him the title of the Eleventh street house, would not suffice to defeat his action *in toto* but *pro tanto*, and the evidence showed the collateral security encumbered and worthless. It was a matter for *recompment*. *Leonard vs. Dyer*, 26 Conn., 172; *Ritchie vs. Atkinson*, 10 East, 295; Chitty on Contracts, page 809, note *u*, and authorities there cited.

Third. Pomeroy could not rescind the contract, having failed to perform his part thereof. Chitty on Contracts, page 814, and note *u*.

Fourth. If Pomeroy treats the contract as rescinded by Simmons' return to Langdon of the titles to the Eleventh street house, he must return to Simmons the consideration paid at his request to Langdon, namely, the two thousand dollars worth of books. Bishop on Contracts, paragraphs 670, 680, 681.

W. J. NEWTON and R. B. LEWIS for defendant:

The contract on defendant's part, to transfer patent for Florida lands to plaintiff, and on plaintiff's part, to "return" or convey title to house 1743 Eleventh street to defendant, were mutual and dependent stipulations.

When plaintiff declares in a contract, which contains mutual and dependent stipulations, he cannot recover "without averring performance or an offer to perform on his part." *Kane vs. Hood*, 13 Pickering, 281.

It does not lie in the mouth of the plaintiff to say that the title to house No. 1743 could be of no value to the defendant. He could not constitute himself the judge of this, and upon an exercise of that judgment adverse to the defendant, give it as an excuse for the failure to perform his part of the contract.

By this act the plaintiff rendered himself liable to be sued for a breach of his contract, and having failed to perform a mutual and dependent stipulation of this contract, and having rendered himself unable to perform it, he cannot compel performance on the part of the defendant of his part of the contract.

“When a party has disabled himself from making an estate which he has stipulated to convey, he commits a breach of his stipulation and is liable to be sued.” Chitty on Contracts, 799; Lovelock *vs.* Franklyn, 8 Q. B., 371; Fairbanks *vs.* Dow, 6 N. H., 267; Beecher *vs.* Consadt, 3 Kernan, N. Y., 108; Grant *vs.* Johnson, 1 Selden, N. Y., 247; Johnson *vs.* Wyngant, 11 Wend., 48; Ford *vs.* Tilley, Barn. & Cress., 325.

Mr. Justice Cox delivered the opinion of the court.

On the 2d of April, 1879, a contract was entered into between George Simmons and Andrew Langdon, the substance of which is, that the party of the first part, Simmons, sells to Langdon all of certain books, furniture and fixtures contained in certain rooms of a house in Washington, and in consideration of this, Langdon conveys by deed forty acres of land in Wisconsin, and also eight hundred acres of government land in Florida, “the same to be satisfactory to Simmons as to title, and to be located by him.” Langdon at once took possession of the books, and, as the contrary does not appear, we presume that he conveyed the land in Wisconsin. He did not pretend to have title to the land in Florida at that time, but he had an agreement with the defendant, Pomeroy, by which Pomeroy was to convey to him those lands, and we also infer, from what follows, that, as a consideration for those lands, he was to convey to Pomeroy a

house located in Washington, No. 1743 Eleventh street n. He not being prepared to convey the land to Simmons, they seem to have made an arrangement all around, by which Pomeroy agreed with Langdon to convey the land so contracted for to Simmons, and, at the same time, the house which Langdon was to convey to Pomeroy was conveyed to Simmons, and the latter assumed to convey it to Pomeroy. Thereupon, Pomeroy and Simmons made a new contract on these terms:

"For value received, I hereby agree to sell to George Simmons eight hundred acres of land in Florida, the patent for the same to be transferred to Simmons as soon as received by me; and I hereby consent to have A. Langdon convey to Simmons the titles to house number 1743 11th street n. w. (subject to the incumbrance now on it), the same to be held by Simmons as collateral security for the perfection of the title to the Florida lands, and, when the title is so perfected, Simmons to return to me the title to the house number 1743 11th street."

Pomeroy failed to convey the land, and this suit was brought upon that agreement, to recover damages for that failure. It turns out in evidence, however, that Simmons had, in the meanwhile, conveyed the house back to Langdon so that he was not ready to convey to Pomeroy, even though Pomeroy had been ready to convey the Florida land; and the defence is, that Simmons having put it out of his power to perform his part of the agreement, there is no right of recovery against Pomeroy on his agreement to convey the Florida lands. The court so held below, and granted an instruction to the jury to find for the defendant.

The answer to that, by the counsel for the plaintiff, is very ingenious. He takes the position that the consideration for this agreement of Pomeroy to convey the Florida land was two-fold; it was, first, the delivery of these books, and secondly, the covenant to convey the house on Eleventh street. He says that a delivery of these books to Langdon is what moved Pomeroy to make this agreement to convey, so that Pomeroy is to be considered as having participated in the

consideration and really received it. He says there was on one side a consideration executed and an executory agreement; on the other side an executory agreement alone. Then he invokes the rule of law that where the covenant on one side is only part of the consideration for the covenant on the other, the covenants are independent, and one may be enforced or sued upon without performing the covenants on the other side, while it is true that a failure on the part of the other side could be used by way of recoupment.

This proceeds on the mistaken theory that Pomeroy received, directly or indirectly, a consideration in the delivery of those books, &c. Pomeroy had simply a contract with Langdon that the latter would convey the house on Eleventh street in exchange for his Florida lands, and Langdon, in consideration of receiving these books, &c., from Simmons, turned that covenant over to Simmons; so that the only consideration to Pomeroy was the agreement to convey this house, which Simmons assumed. He had no interest in the executed part of the consideration of the agreement between Simmons and Langdon.

It is claimed again, they are not mutually dependent covenants because one was to be performed after the other; in other words, *after* Pomeroy should make title to the Florida land, or *when* the title was perfected, Simmons was to return the house. The true meaning is, that as soon as Pomeroy should perform, and concurrently with the act of delivering the patents to this Florida land, the plaintiff should convey the house on Eleventh street. It seems to us that Simmons was bound to be ready to convey this house just as soon as Pomeroy tendered to him the patents to this land. If he put it out of his power to convey the house, by returning it to Langdon, as the proofs show he did, he had already broken his part of the agreement and was not in a condition to sue for the violation on the part of Pomeroy. Therefore, on the undisputed facts, the court below did right to instruct the jury to find for the defendant.

JOHN WEBSTER,

vs.

JOHN C. HARKNESS, Garnishee of Charles Lemon, Jr.

LAW. No. 23,460.

{ Decided April 7, 1884.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. Where an assignment is made by a debtor to a third person as trustee for the benefit of the assignor's creditors, the assent of the creditors provided for to the assignments will be presumed.
2. In such case the money is no longer under the control of the debtor, and consequently is not liable to attachment.

THE CASE is stated in the opinion.

CHAS. A. ELLIOT for plaintiff.

WM. F. MATTINGLY for defendant.

Mr. Justice COX delivered the opinion of the court.

The facts in this case appear to be, that Charles Lemon, jr., was a carpenter and builder, and was employed in 1881 to erect an addition to the building of the Washington City Orphan Asylum. The defendant, Harkness, was one of the trustees of the asylum, and superintendent of the work done by Lemon, and payments were made by the treasurer of the asylum on Harkness' certificates to him. Upon the finishing of the work, there was due to Lemon, the contractor, the sum of \$276.25. But Lemon was indebted in a larger amount than this to a number of sub-contractors who had furnished materials and done work upon the building, and he requested Harkness to retain this money and apply it ratably among the claims of these sub-contractors. Harkness preferred that he should draw the money and then pay it over to him for that purpose, and he accordingly did it. He drew the money, and then paid it to Harkness, and accompanied his payment with the following note:

"Mr. Harkness. Sir: I herewith leave with you the balance of my asylum account, \$276.25, which you will please distribute to my creditors for work and material furnished on said asylum *pro rata*. I will furnish you a statement of

indebtedness as soon as I can. By doing this for me, you will oblige, yours,

“CHARLES LEMON, JR.

“JANUARY 28, 1883.”

On the same day on which this money was paid Harkness, Lemon met the plaintiff in this case, Webster, who was one of the sub-contractors, and to whom a small amount was due, and informed him of the arrangement. At the same time, it appears that Lemon was indebted to him in a larger amount, for work done on other houses, and the plaintiff asked Lemon if he would confess a judgment in his favor, which he consented to do. He testifies that he confessed judgment, because he knew that he was indebted to the plaintiff, but he did not confess it to enable the plaintiff to defeat his arrangement with Harkness. As soon as the plaintiff obtained judgment against Lemon, he caused an attachment to be issued and levied upon the whole of this fund in Harkness' hands. The defendant, Harkness, pleaded *nulla bona*.

The case went to trial on the facts I have mentioned, and the court instructed the jury to find for the defendant, and the plaintiff moves for a new trial on the bill of exceptions.

The question presented in the case is simply this: We are to determine, where money or specific property has been assigned to a person to be applied ratably among the assignor's creditors, whether another creditor, not provided for in that arrangement, can attach the fund in the hands of the depositor at all; and if so, under what circumstances and when.

It is claimed on the part of the plaintiff here, that inasmuch as the creditors provided for in this assignment were not notified of it before the attachment was levied, and did not give their assent to it, the transfer of the property in the fund was not complete, and it remained the property of Lemon, who had deposited it with Harkness, and therefore subject to execution at the suit of other creditors.

It is not perfectly easy to harmonize all the authorities upon this question. There is a distinction, however, which

will tend to reconcile them, and that is, the distinction between an agency created in the depositary, for the party paying the money, and a complete trust for the benefit of other parties. As long as the depositary can be regarded as the agent of the party paying the money or delivering to him the specific property, there is no question that the property remains in the debtor, and is subject to the proceedings of his creditors until something else at least is done. One of the courts says: "Suppose I send my son with money to pay a note in bank, is it to be held that I cannot recall him, and retain possession of my money?" All this proceeds on the idea that the depositary is the agent, the servant, of the party delivering the money, and, as long as he retains that relation, there is no question about the liability of the fund to attachment for the creditors who are not provided for in the assignment. But even in that case, as soon as the creditors who are attempted to be provided for assent to the arrangement, or even are notified of it, and in that way are brought into privity with the depositary, then the debtor's control of the fund ceases, and it is no longer subject to attachment by other creditors than those specially provided for. That is one class of cases.

Another class of cases is, where it is manifest that the intention of both parties is that the control of the debtor over the fund shall pass from him immediately. Under that head, it is held that if the assignment is made immediately by the debtor to his creditors, their assent is necessary to perfect it, just as an actual delivery is necessary to perfect a gift. There must be two parties to the transaction, and however absolute the form of assignment may be, until it is accepted, it does not pass the property. But when the title and possession of the property have passed out of the debtor to a third person, as trustee for the creditors, then the courts hold that the assent of the creditors provided for will be presumed. That question was recognized as settled, by the Supreme Court, a long time ago, in the case of *Brooks v. Marbury*, 11 Wheaton, and in the case of *Nicoll v. Mumford*, 4 Johnson's Chancery Reports, 529; and many other

cases recognize the same thing. So that the distinction is **between** a mere agency for the debtor, which he may **control**, and a complete trust by which the title passes entirely **out** of him for the benefit of the creditors, and it must necessarily be a question of intention in each particular case.

Now, to apply this to the present case. Here was a fund **which** equitably belonged to the sub-contractors under **Lemon**, because it was due for the very work that they had **furnished**. It was in their power, by giving proper notice **to** the officers of the asylum, to secure that fund. But the **necessity** of that was obviated by the voluntary act of the **contractor** himself, who proposed to appropriate the fund **to** the use of the sub-contractors. A significant feature of the **case** is, that as soon as the money was deposited with **Harkness**, **Lemon** went about and notified the sub-contractors **that** it was there for their use; and meeting this plaintiff **on** the same day, notified him of the arrangement, and **within** a week notified all the others. He notified the **others**, it is true, after the attachment had been levied, but **it** does not appear that he knew of that fact at the time. **But** the fact that he gave notice to them all is significant of **his** intention. It is obvious that he intended to put the fund entirely out of his control, to lodge it with **Harkness** irrevocably as a trust fund for the benefit of the sub-contractors who were equitably entitled to it, and we feel sure **that** **Harkness** would never have accepted it subject to the recall of this contractor himself, and that he took it with **that** understanding also; and that would bring it within the rule that where the title passes out of a party to a trustee, the **assent** of the creditors intended to be benefited will be **presumed**.

But there is still another striking feature about this case. **On** the very same day on which the fund was put in **Harkness'** hands, the debtor gave notice to this plaintiff of the **fact**, and that this arrangement had been made partly for **his** benefit. Webster might have said to him, "I do not **assent** to that, I shall resort to my legal remedies," and **might** have gone to work and brought a suit and got judg-

ment and issued an attachment. Or, he might have done just what he did, and at the same time dissented from this arrangement. He might have said, "I do not assent to it, but I ask you to confess judgment, and I will relieve myself as best I can."

But he did nothing of that sort. He kept silent with reference to this arrangement. He knew perfectly well that Lemon did not confess judgment to him for the very purpose of defeating the arrangement just announced to him, and partly for his benefit; and when he asked Lemon to confess judgment, the latter had a right to assume that he assented to the appropriation of this fund to the subcontractors. We think he was bound to formally dissent, that he must be presumed to have assented to that arrangement at that time. That very fact put it beyond the power of Lemon to recall that fund, as far as Webster was concerned, and Webster could not assent to that arrangement so far as it benefited himself, and repudiate it so far as benefited the other contractors. He could not dissent by mere mental reservation. We think, under the circumstances, he is presumed to have assented to the arrangement that was announced to him, and there is authority for saying that, under these circumstances, if he had recovered his judgment, and got his money, these other subcontractors might have sued him for their money and recovered their shares from him. We think, on the whole, therefore, that the court was right in giving instruction that the verdict should be for the defendant.

JAMES N. CARPENTER

vs.

WASHINGTON & GEORGETOWN R. R. CO.

Law. No. 23,816.

{ Decided April 14, 1884.

{ The CHIEF JUSTICE and Justices COX and MAC ARTHUR sitting.

1. It is in the discretion of the court to refuse all instructions prayed for by either party, and to state the law in its own language.
2. On exceptions for error in a part of the charge to the jury, the court will look at the whole charge, and if it see that in the very next paragraph an apparent error is corrected, the exception will not be sustained.

THE CASE is stated in the opinion.

B. J. DARNEILLE and JOHN E. LATIMER for plaintiff.

ENOCH TOTTEN for defendant.

Mr. Justice COX delivered the opinion of the court.

The case of James N. Carpenter against the Washington and Georgetown Railroad Co. is an action for trespass by ejecting the plaintiff from the cars of the defendant. The case made by the plaintiff, in his evidence, was, that he entered one of the cars of the company on Seventh street, going south towards Pennsylvania avenue, and at the junction of Seventh street and the avenue he applied for a transfer ticket for the purpose of going down the avenue towards the Capitol. When he entered the avenue car, or shortly afterwards, he discovered that his ticket was a ticket for the Seventh street track, which he had just left, and upon presenting it to the conductor, the latter refused to acknowledge it, and required him to pay an additional fare, and upon his refusal to do so, he was violently forced out of the car. That is the trespass complained of.

For the defendant, the proof tended to show that the plaintiff, instead of getting off the Seventh street car, approached the agent from the rear of an avenue car going west, together with other passengers manifestly leaving that car, and that they were receiving transfer tickets from him, and he supposed this plaintiff to be one of that company,

and delivered this transfer ticket, to go on the Seventh street car, to him, as he did to the others, and the plaintiff took it without objection, and therefore it was the plaintiff's own negligence that led to this result.

The only question before us relates to certain instructions that were asked and refused. At the trial, several instructions were granted at the instance of the plaintiff, and then the following were refused :

"That if the jury shall believe from the evidence that the plaintiff paid his fare on the Seventh street car, and on arriving at Pennsylvania avenue, the Pennsylvania avenue car of the defendant was then stopping at the crossing of the two lines (Pennsylvania avenue and Seventh street), and plaintiff, immediately on arriving at Pennsylvania avenue, went to the transfer ticket agent of said defendant, there stationed, and asked for and received a transfer ticket, and that then and there the transfer ticket agent gave him a transfer ticket; that thereupon the plaintiff went immediately with said transfer ticket on board the said Pennsylvania avenue car, and after the car started, offered it, when called on in the usual way, to the conductor, who refused to receive it, but, together with the driver of the car, forcibly put plaintiff off the car, then they shall find for the plaintiff, even if they should also find that the transfer ticket agent had given plaintiff a wrong ticket, either intentionally or by mistake."

And again :

"That if the jury shall believe from the evidence that the ejection of the plaintiff from the Pennsylvania avenue car resulted from the slightest neglect or misconduct of the transfer ticket agent, or the conductor of the Pennsylvania avenue car, then they shall find for the plaintiff."

And again :

"That if the injury complained of could have been prevented by the exercise of ordinary care by defendant, the defendant is liable even if the plaintiff was at fault."

And again :

"That if the jury shall believe from the evidence that the

conduct of the defendant was wanton, then the negligence of plaintiff, even if proved, would be no defence."

These several instructions were refused in the form in which they were applied for, and an exception taken to each refusal. But in the final charge which the court gave to the jury, they were instructed as follows:

"That if they believed from the evidence that the agents of the defendant had made a mistake in giving to the plaintiff a transfer ticket, and instead of giving him a Pennsylvania avenue transfer, had given him a Seventh street transfer, the plaintiff was entitled to recover, and that in assessing the damages the plaintiff was entitled to have reasonable damages, compensatory for the treatment which he had received, and that the defendant company was bound to see to it that the plaintiff was provided with a proper transfer, and that if the mistake had been made, the responsibility therefor rested upon the company and not upon the plaintiff.

"And the court further instructed the jury that if, upon the other hand, they believed that the conduct of the agents of the company was wanton and malicious, and that they had purposely given him the wrong transfer, and that they had maliciously and wantonly ejected him from the car because of a personal dislike or animosity, that then the plaintiff was entitled to recover, and in assessing damages in that view of the case, the plaintiff was entitled to recover not only compensatory, but vindictive damages."

We are of opinion that the instruction given in the charge covered all the ground claimed by the plaintiff himself, and was all the instruction he was entitled to ask, and I believe that was virtually conceded by the counsel in argument.

But it is claimed on the part of the plaintiff, that the court is not to look at the charge given by the court below, but only at the instructions that were proposed, refused, and excepted to.

It is perfectly true that we do not revise for the purpose of correcting, as error, anything that is not excepted to below. But we are not looking at it in that view, but only

to ascertain whether, on the whole, the instruction given by the court below was correct. It was the practice of the late Chief Justice Taney, in his circuit, always to refuse such instructions prayed for by either party, and then to give the law in his own words. That is also the practice of other courts, and we consider it to be in the discretion of the court to reject all prayers and state the law in its own language. That was the practice pursued in this case to some extent. Some of the prayers of the plaintiff were granted but the substance of those that were refused was given on this charge. It is a very common thing to except to a part of the charge, but the court must look at the whole charge and if they see that, in the very next paragraph, an apparent error in one part is corrected, then no injury on the whole is done to the plaintiff or defendant, as the case may be. We consider it to be perfectly proper for the court to announce the law in its own language, and if it gives the law correctly, although it may have refused the instruction asserting it in another shape than that asked by the counsel, there is nothing that can justify us in reversing the judgment and ordering a new trial, and that is precisely this case.

On the whole, we think the court instructed the jury very liberally, if not too liberally, in favor of the plaintiff, and we see no ground, therefore, for reversing the judgment below, which was for the defendant.

U. S., *EX REL. R. HOE & Co., and GEORGE G. GILL,*
vs.

BENJAMIN BUTTERWORTH, Commissioner of Patents.

LAW. No. 25,184.

{ Decided April 14, 1884.
 { The CHIEF JUSTICE and Justices MAC ARTHUR, COX and JAMES
 sitting.

1. The decision of the Commissioner of Patents on the right of an applicant to receive a patent, is an act of executive discretion and cannot be interfered with by mandamus.
2. So, too, after the decision has been made and communicated to the applicant, and at any time before the issue of the patent for the signature of the Secretary of the Interior, it is within the Commissioner's discretion to reconsider his decision and to make a contrary one.
3. But if he does not, then his executive discretion being exhausted in deciding that the applicant is entitled to a patent, there remains but the ministerial duty to issue it; and to compel the performance of this act, in case of refusal, mandamus is the proper remedy.
4. It is a settled rule that the Revised Statutes are to be construed in the light of the original statutes from which they were taken.
5. An appeal from the decision of the Commissioner of Patents upon the right of an applicant to receive a patent, lies directly from him to this court in General Term, and not to the Secretary of the Interior; the latter has not appellate or revisory power over the decision of the Commissioner upon that question.

THE CASE is stated in the opinion.

MUNSON & PHILLIPS for relator.

FRANK T. BROWN for respondent.

Mr. Justice JAMES delivered the opinion of the court.

This is a petition for a writ of peremptory mandamus to the Commissioner of Patents to receive the final fee and to cause letters-patent to the relators, R. Hoe & Co., to be prepared and presented to the Secretary of the Interior for his signature. It sets forth that, on March 12, 1881, the relator, Gill, made application for letters-patents for certain improvements in printing machines; that on primary examination the Commissioner was of opinion that this application would interfere with an unexpired patent granted to Walter Scott on March 8, 1881; that such proceedings were had that an interference was duly declared, whereupon the

examiner of interferences decided that Scott was the original and first inventor of said improvements; that upon appeal to the examiners-in-chief this decision was affirmed; that upon further appeal to the Commissioner, the latter decided that the relator, Gill, was the original and first inventor, and entitled to a patent for said improvements, and that he finally decided, on June 4, 1883, that such patent should issue; that the relator, Gill, assigned to the other relators all his title to said invention, and requested the Commissioner to issue the letters-patent therefor, when granted, to them; that the final fee was tendered to the Commissioner, who refused to accept it, and also refused to cause letters-patent to be prepared and presented to the Secretary of the Interior for signature; that the relators were informed by the Commissioner that the only ground of his refusal was the pendency before the Secretary of the Interior of an appeal taken by Scott; that the Commissioner has not denied, and does not deny, that a patent should issue to Gill, unless the Secretary has the right to suspend the issuing thereof by reason of the appeal pending before him; and that the Commissioner has still later informed them that the Secretary has, upon said appeal, reversed his decision and decided that Scott is the original and first inventor of said improvements, and is entitled to a patent therefor. In the communication last referred to, which is addressed to the relator's counsel, and is made part of the petition, the Commissioner says:

"If the decision of the Commissioner adjudging priority to your client is final, and not subject to review and reversal by the Honorable Secretary of the Interior, then your client is entitled, on payment of final fee, to have his patent prepared and issued. But if the Honorable Secretary has, under the law, jurisdiction on appeal to hear and determine the cause, then your client is not so entitled. The decision of the Commissioner of Patents, is that your client, Gill, is entitled to the patent prayed for; on appeal from that decision the Honorable Secretary decided that your client is not so entitled. In view of the facts related, I refuse to is—

sue a patent for your client, or to prepare a patent for issue, or to take any steps whatever in that direction. I do this, not because I want further time to consider the case, but because the Honorable Secretary has, on hearing the cause, reversed the decision of the Commissioner of Patents, as hereinbefore stated."

In his return the Commissioner says that the statements of the relators as to the applications, appeals and decision of the Commissioner are true, and that this decision has not been reversed or modified by the Commissioner; that on the 14th of June, 1883, an appeal to the Secretary of the Interior was taken by Scott, and prosecuted under rules prescribed by the Secretary, and that on March 7, 1884, the Secretary made a decision reversing the decision of the Commissioner and adjudging that Scott was the first inventor and that Gill was not entitled to a patent; that pending that appeal, namely, on the 4th day of March, 1884, the relator did demand of respondent that he prepare a patent for issue to the relator, Gill, in pursuance of the decision of the Commissioner of Patents, and that respondent refused so to do, or to take any steps in that behalf; that, after the decision of the Secretary had been pronounced, the relator again demanded that the respondent prepare for issue a patent in accordance with the judgment of the Commissioner, tendering at the same time the final fee due; that respondent refused to accept said fee, and again refused to prepare said patent; that he so refused, not because he desired to make further inquiry, or to be further advised in that behalf; but that he based his refusal, and does so still, solely upon the ground that the Secretary of the Interior had entertained the appeal taken to him from said decision, and had entered a decision reversing that of the Commissioner of Patents, and awarded priority of invention to Walter Scott. The return further states that, on the 26th of February, 1884, the Secretary of the Interior advised respondent that, in pursuance of an opinion of the Attorney-General, to the effect that he could, on appeal to him, exercise the jurisdiction to review the decision of the Commissioner of Patents, he

had exercised that jurisdiction; and that respondent, in deference to that opinion and the action of the Secretary, refused, and does refuse to accede to the demand of the relator. In conclusion he says:

"Your respondent further says, that if the judgment of the Commissioner of Patents, *which is, that the relator is entitled to receive his patent, as prayed for*, is final, and if upon such judgment it is the lawful duty of the respondent to accept said final fee and take the necessary and proper steps to prepare said patent for issue, as prayed, then your respondent has improperly refused to prepare said patent for issue; but if his decision is subject to review and reversal by appeal to the honorable the Secretary of the Interior, then such refusal on the part of your respondent to accept said fee and prepare said patent for issue, is right and proper.

Upon these facts we are asked to require the Commissioner of Patents to accept the final fee tendered by the relator and to prepare and submit to the Secretary of the Interior for his signature, letters-patent to them for the improvements in printing machines described in the petition. The questions involved have been argued with very noticeable care and ability by counsel for the relators, and counsel appearing, as we understand, in fact, in the interest of Scott, but nominally, as *amicus curiæ*, inasmuch as Scott is not a party to this proceeding.

It is claimed by the latter that the relators are not entitled to the remedy of mandamus, first, because the Commissioner of Patents has no longer the legal power to do the act which would be commanded by the writ; that power having been superseded and taken away from him by a lawful appeal to the Secretary of the Interior, and a lawful and controlling decision by the latter, that the relators are not entitled, and that Walter Scott, the adverse party to the interference, is entitled to a patent for the improvements in question; and secondly, because, even if it should be held that the appeal to the Secretary of the Interior, and his decision in the premises, were unauthorized, and therefore in contemplation of law a nullity, the writ would do something more than

command a merely ministerial act, and would, in fact, control what would still be a matter of executive discretion with the Commissioner himself; and third, because the patent laws have provided for the relator a different and adequate remedy. Reversing the order of these propositions, we shall first consider whether, assuming that the Commissioner's decision upon a question of interference is final and conclusive as to the matters submitted to him, so far as executive action is concerned, and is not subject to review by the Secretary of the Interior, the writ of mandamus is inapplicable under the circumstances of this case.

We find that the Commissioner has in his return defined the status of the proceedings reached in his own action. He "admits that it is true that the Commissioner of Patents did decide and adjudge that the said George C. Gill was entitled to receive a patent, as set forth by the relator herein, * * * and that said decision has not been reversed or modified by the Commissioner of Patents." He then states that, when he refused the relator's demand for the issuance of a patent, it was "not because he desired to make further inquiry, or to be further advised in that behalf;" and in the conclusion of his return, he says: "If the judgment of the Commissioner of Patents, *which is that the relator is entitled to receive his patent as prayed for*, is final, and if upon such judgment it is the lawful duty of the respondent to accept said final fee and take the necessary and proper steps to prepare said patent for issue as prayed, then your respondent has improperly refused to prepare said patent for issue."

Now, we do not doubt that it is within the executive discretion of the Commissioner, even after making and communicating to an applicant a decision in his favor, and at any time before the issue of a patent for the signature of the Secretary, to reconsider that decision, and to make a contrary one. In the ordinary course of business the whole matter rests in executive discretion, at least down to that point, and, if nothing more appears, the court will not interfere by the writ of mandamus to compel the issue of a patent,

as the next and consequent step. The Commissioner could answer a demand of the applicant by the simple statement that he had changed his mind, and had decided that the applicant was not entitled to a patent; and, so long as he must be supposed to occupy that position, he cannot be treated as if he had ceased to do so. It cannot yet be said that his only remaining duty is ministerial. But the respondent does not, in any true and practical sense, occupy that position. He has said, substantially, that the original decision of the Commissioner of Patents, to the effect that the relator was entitled to a patent as prayed for, has not been changed; that he does not even intend to re-examine it, and that it is *now his decision*. And it is important to observe that this was not merely a position taken in his official communications with the relators; it is the position on which he stands in this court. Now, a position thus assumed in a judicial proceeding, may, for the purposes of that proceeding, be treated by the court as the conclusive legal attitude of the party. The executive decision which he thus presents to us, and stands upon, must be regarded here as a final fact which is to determine legal consequences in the case. What, then, is the legal consequence of a fixed decision, or what we must treat as a fixed decision—that an applicant is entitled to a patent? No question could be raised if that decision were final, because the law has declared it to be final as soon as it was made. The legal consequence of that fixed decision would be the ministerial duty to issue the patent. We perceive no principle which should distinguish the Commissioner's duty in the case before us from his duty in the case supposed. On principle, the same duty must accrue whenever his decision to issue a patent must be treated by the court as a fixed and permanent one. Although the law contemplates that the Commissioner may reverse such a decision and *thereby* defeat the issuance of a patent, it clearly does not contemplate that he may adhere to and stand upon it in this court, and yet defeat the issuance of a patent by simply refusing to act in pursuance of that decision. The progress of executive duty may lay

fully be reversed by a new and lawful executive action in a contrary direction, but it would be unreasonable that the law should be arrested at a half-finished stage simply by non-completion, and that there should be no remedy to compel its movement. It would be playing with words, substituting phrases for substance, to say that the writ of mandamus must not be applied in commanding the final step to be taken, on the ground that, down to the actual issue of the patent, the whole matter must still be regarded by us as resting in executive discretion, whether a patent shall issue or not. When an officer stands in court, by his return, upon the ground that he has exhausted the uses of his executive discretion, and refuses to take the ministerial step which follows next when executive discretion has ended, he presents to the court the very evil which the writ of mandamus is designed to remove; a refusal, namely, to perform a ministerial duty.

But it was suggested further, that the determination of the Commissioner not to disregard the action of the Secretary, was an exercise of executive discretion, and that, whether he was right or wrong in that determination, his executive action in that matter is not to be controlled by mandamus. It must be remembered that we are now considering the applicability of this remedy on the hypothesis that the Commissioner's control of the question before him was final, and that the Secretary was without power in the premises. On that hypothesis the Commissioner's forbearance or refusal to proceed according to his own judgment, must be regarded in law as simply an act of deference. It was not a decision as to his own legal duty. However discreet such conduct towards the head of a department may have been, it did not constitute an exercise of that kind of discretion with which a court must not interfere by mandamus.

It was also suggested that, as the statute provides that, "The Commissioner of Patents, under the direction of the Secretary of the Interior shall superintend or perform all duties respecting the granting and issuing of patents

directed by law," the Commissioner must be held to have construed this provision, and to have acted upon that construction in refusing to proceed in pursuance of his own decision after the Secretary had undertaken to review and reverse it. This, it is claimed, was an exercise of executive power and discretion which the court must not control by mandamus. But it is apparent on the whole face of his return that the Commissioner, in refusing to follow up his own decision, did not, as a matter of fact, act upon any executive construction of his own as to that provision. It is to be gathered from his answer that the question whether the section gave revisory power to the Secretary, was the one which he had not undertaken to settle. Instead of informing us, either expressly or inferentially, that his decision upon that question was the rule of his action in refusing to proceed in pursuance of his own original decision, he distinctly submits it as an unsettled question. Deference to the will of the Secretary, so far from being a decision upon this question, constituted an abandonment of any effort to decide it. Plainly he did not attempt to decide executively upon the effect of the provisions referred to. But the important point to be observed is, that it is wholly immaterial whether he acted upon a construction of that law. If his decision upon the original question before him was not subject to revision by the Secretary, and if he himself had acted that only a ministerial duty remained to be performed by him, that ministerial duty would not cease to exist merely by reason of his deciding incorrectly that the whole of his power had been taken away. To interpose that decision would be merely to give a bad reason for refusing to perform his ministerial duty; and to describe it as an exercise of executive discretion, and thus to exclude the remedy by mandamus, on the principle that it is never used to control executive discretion, would be to defeat the remedy by mere misnomer. He had no executive discretion to deny his duty, either directly or by circuitry.

It was next objected that this remedy is not applicable because a different and adequate remedy has been provided for

the relators. This objection refers to section 4915 of the Revised Statutes, which provides that:

“Whenever a patent is refused, either by the *Commissioner of Patents* or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by a bill in equity, and the court having cognizance thereof, on notice to adverse parties, and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention as specified in his claim. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not. This objection, that the relators have another remedy in this case, comes rather inconveniently from the party who makes it. His principal position is that the decision of the Commissioner has been lawfully reversed by the Secretary. If that be true, it is the Secretary, not the Commissioner, who has refused them a patent; and this section does not provide them a remedy by a bill in equity on such refusal. We must consider the objection, however, on the hypothesis that the Secretary's action is a nullity.

This section applies to interference cases as well as to applications *ex parte*. When there are adverse parties, notice must be given to them; they are let in as formal parties to the contest, and the contest is upon proofs and the merits of the adverse claims. The case is heard *de novo*. Can it be seriously claimed that the right to try his case in this manner, under the burden of paying all the expenses of the proceeding, is an adequate remedy to a party who is *already entitled* to his patent by the favorable decision of the Commissioner? We conceive that this is one of the cases in which a question is its own answer. Although it may be said that

the object both of the petition for the writ of mandamus and of the bill in equity is to obtain a patent, the subject of enquiry and the basis of relief in the two proceedings are wholly different. In the proceeding for mandamus, the inquiry is, whether the right of the petitioner to a patent has already been decided, and in such a way that he is entitled to the fruit of that decision by performance of a merely ministerial duty. In the equity proceeding, the inquiry is, whether he proves originally a right to have a patent. Clearly, the right to have the latter inquiry and adjudication is not an adequate remedy to one who already has a sufficient determination of the same question, and only asks for execution.

It was insisted at the argument, that the objections which we have examined, or any one of them, would forbid the granting of a writ of peremptory mandamus in this case, even if the court should be of the opinion that the Secretary of the Interior does not possess revisory or appellate control over such decisions of the Commissioner of Patents, and that they should preclude an inquiry into the extent of the Secretary's powers. We have, therefore, considered them attentively; and we hold that if the power of the Commissioner of Patents to adjudicate the questions presented to him in the premises was final, so far as executive action was concerned, and was not superseded by a lawful appeal to the Secretary, there is nothing in these objections which precludes the application of the writ of mandamus. We proceed, therefore, to consider the question whether the power of the Commissioner to comply with the command prayed for has been taken away from him by a lawful appeal to the Secretary, and a lawful decision by the latter reversing the decision of the Commissioner.

The claim of revisory power in the Secretary of the Interior was based, in the argument, upon the following provisions of the Revised Statutes:

"SECTION 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: First, the census, when directed by law;

second, the public lands, including mines; third, the Indians; fourth, pensions and bounty lands; fifth, patents for inventions; sixth, the custody and distribution of publications; seventh, education; eighth, government hospital for the insane; ninth, Columbia asylum for the deaf and dumb.

"SECTION 481. The Commissioner of Patents, *under the direction of the Secretary of the Interior*, shall superintend or perform all duties respecting the granting and issuing the patents directed by law.

"SECTION 483. The Commissioner of Patents, *subject to the approval of the Secretary of the Interior*, may from time to time establish regulations, not inconsistent with law, for the conduct of proceedings in the Patent Office.

"SECTION 487. For gross misconduct, the Commissioner of Patents may refuse to recognize any person as a patent agent, either generally or in any particular case; but the reasons for such refusal shall be duly recorded, and be *subject to the approval of the Secretary of the Interior*.

"SECTION 4883. All patents shall be issued in the name of the United States of America, under the seal of the Patent Office, and shall be *signed by the Secretary of the Interior*, and countersigned by the Commissioner of Patents."

Especial emphasis, of course, was laid upon section 481, which provides that the Commissioner shall perform his duties under the direction of the Secretary. It is claimed broadly that, "The power of supervision and direction gives jurisdiction to the Secretary, upon application made to him in any form that he may proscribe, by appeal or otherwise, to affirm, reverse, or modify the action of the Commissioner."

The provisions referred to, and all of the provisions of the Revised Statutes which we shall have occasion to consider, were taken from the act of July 8, 1870, which was entitled, "An act to revise, consolidate and amend the statutes relating to patents and copy-rights." In that work of consolidation, section 481 was taken, without any change except the rejection of redundant words, from the first section of the act of July 4, 1836, by which the office

of Commissioner of Patents was first established. It is of some importance, therefore, to examine the extent of the supervisory powers of the Secretary of State, as given by this same provision in the original act.

Section seven of that act provided that the Commissioner should "make or cause to be made," an examination of every application for a patent, and that if, after certain proceedings had, he should decide that the applicant was not entitled to a patent, an appeal might be taken to a board of examiners, "to be composed of three disinterested persons," appointed for that purpose by the Secretary of State, one of them, at least, to be "selected, if practicable and convenient, for his knowledge and skill in the particular art, manufacture or branch of science," to which the alleged invention appertained. This board might "reverse the decision of the Commissioner, either in whole or in part," and when their opinion was certified to him, he was to be governed by it in the further proceedings to be had. Section eight related to interference cases, and provided a like appeal with like effect, from the Commissioner's decision.

The act of 1836 provided, then, that the Commissioner should perform his duties "respecting the granting and issuing of patents," "under the direction of the Secretary of State," and it also provided that he should make a decision on the question whether an applicant was entitled to a patent; but it provided further that these decisions should be revised and controlled by a board of examiners. This revision was part of the regular course of executive administration, and the statute gave the Secretary no control over the board of examiners. It is obvious, then, that the Secretary's control over the Commissioner could not be exercised in the form of revisory power over his decisions. Now, it is nothing to the purpose to suggest here that a revisory tribunal no longer intervenes between the Commissioner and the Secretary's control, and that the decisions of the former are thus brought within the operations of the Secretary's direction. The point to be observed is, that the direc-

tory power of the Secretary of State and of the Secretary of the Interior was expressed in the same terms, and that that grant of power, as found in the act of 1836, did not pretend to give appellate and revisory power over the decisions which the Commissioner was authorized to make. Let us see whether anything in the act of 1870, which is found in the Revised Statutes, requires us to adopt a different rule in construing the same language.

It is important to observe just here, that, although section 481 of the Revised Statutes, which gives the Secretary of the Interior directory power over the duties of the Commissioner of Patents, is found in Title XI, relating to the organization of the Interior Department, and the sections which we shall consider are found in Title LX, relating to the subject of patents and copyrights, all of them were taken from the act of July 8, 1870. In that act they formed parts of one system, and were to be construed together as such. It is a settled rule of construction of the Revised Statutes that its contents are to be construed in the light of the original statutes from which they were taken. This section relating to directory power is, therefore, to be regarded as part of the general system, of which the sections now to be considered are also a part. The following sections provide a system of appeals by which all applications, whether in interference cases or *ex parte*, may be brought before the Commissioner for his decision:

“Sec. 4904. Whenever an application is made for a patent, which, in the opinion of the Commissioner, would interfere with any pending application, or with an unexpired patent, he shall give notice thereof to the applicants, or applicant and patentee, as the case may be, and shall direct the primary examiner to proceed to determine the question of priority of invention. And the Commissioner may issue a patent to the party who is adjudged the prior inventor, unless the adverse party appeals from the decision of the primary examiner, or of the board of examiners-in-chief, as the case may be, within such time, not less than twenty days, as the Commissioner shall prescribe.

"SEC. 4909. Every applicant for a patent, or for the issue of a patent, any of the claims of which have been twice rejected, and every party to an interference, may appeal from the decision of the primary examiner, or of the examiner in charge of interferences in such case, to the board of examiners-in-chief; having once paid the fee for such appeal.

"SEC. 4910. If such party is dissatisfied with the decision of the examiners-in-chief, he may, on payment of the fee prescribed, appeal to the Commissioner in person."

These sections, as we have said, provide a regular system of appeals, both in interference and *ex parte* cases, which brings every application to the Commissioner for decision. The statute commands him to decide, and of course it intends that he shall apply the usual processes of decision in other words, the *judgment* of the person deciding. Can it be possible that the legislature intended, by giving the Secretary directory power, that he might intervene at that point of time, and direct the Commissioner what decision he, the Commissioner, was to make? It must be kept in mind that the whole of the Secretary's power must be found within that one word, "direction." It hardly seems worthwhile to reason upon the question whether a general power to direct authorizes the directing officer to dictate to one who is charged by the very same law with the duty and power of hearing the parties to a contest, and of deciding between them accordingly, what conclusion his mind may reach. Clearly he cannot, in the exercise of this power dictate to the Commissioner touching his decision before he makes it, or while he is making it. Can it be imagined then, that the power of "direction" which cannot lawfully be applied to the Commissioner's action while he is deciding was intended to be applied to the same matter after he has decided? Is it permissible to say that a power of direction which cannot be exercised as direction, may be exercised as a way of appeal and reversal, and all the time be called "directing"?

We are informed by the pleadings and exhibits that the

Secretary of the Interior has acted upon the opinion of a former Attorney-General to the effect that this general provision of directory power controls the meaning of every section which assigns a duty to the Commissioner, just as if it had been inserted in each; and that the duty and power of hearing and deciding contested questions of priority of invention, for example, are to be construed as if the statute said they were to be performed under the direction of the Secretary. We hold that precisely the opposite rule of construction must be applied to the statute in order to ascertain correctly the intention of the legislature. It must be remembered that this provision is general, and that the provisions relating to the duties and powers of the Commissioner are specific. It is the latter which must control. When they are considered together, it must be held that the Commissioner must perform his duties under the direction of the Secretary except when he is already directed what he must do by the superior directory power of the legislature. Applying this rule of construction to the Commissioner's decisions in cases of interference, we hold that they are not subject to the directory power of the Secretary, either by contemporaneous dictation, or by the circumlocution of appeal and reversal, described as direction.

We are brought to this conclusion independently of the provisions of the patent laws which remain to be considered; but we are still further confirmed by these provisions.

Section 4910, as we have seen, provides for an appeal to "the Commissioner in person." Section 4911 then provides that, "If such party, except a party to an interference, is dissatisfied with the decision of the Commissioner, he may appeal to the Supreme Court of the District of Columbia, sitting in banc." By section 4913 the Commissioner is required to furnish the court with "the grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of appeal." Section 4914 confines the revision here to the points set forth in the reasons of appeal, and provides that, after hearing the case, this court shall return to the Commissioner a certificate of its proceedings and

decisions which shall be entered of record in the Patent Office, "and shall govern the further proceedings in the case."

These sections authorize a revision of the grounds on which the Commissioner refuses a patent on application *ex parte*, and they do not authorize a revision of the grounds on which the Secretary may act. Manifestly it was the intention of Congress to provide a judicial revision which should be available in every case in which an application *ex parte* is refused; in other words, that refusal should not be made by an officer whose grounds of decision are not subjected to revision by this section.

Section 4915 provides a still further remedy in case of the refusal of a patent for application *ex parte*, and applies the remedy to refusal of an application in interference. It directs that:

"Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent, on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

This section, and the provisions for appeal to this court, which we have just considered, provide either a formal appeal or an original proceeding substantially appellate in its character, which seems manifestly intended to cover *all* cases in which a patent is "refused," whether they be cases

of application *ex parte* or in interference. It is to be observed that in both cases a refusal *by the Commissioner* is the basis of the remedy; and that it seems to be thus implied that, so far as the executive department is concerned, the examination of a claim for a patent, and the power to decide upon such claim, terminate with him.

But another class of decisions was still to be provided for. The provisions which we have considered relate only to cases in which patents were refused; but it might happen that a patent was improperly granted. A remedy for such cases is found in section 4918, which provides that:

“Whenever there are interfering patents, any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent; and the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented. But no such judgment or adjudication shall affect the right of any person except the parties to the suit, and those deriving title under them subsequent to the rendition of such judgment.”

In this review of the patent laws, certain facts are prominent. The same statute which provides that the Commissioner of Patents shall “perform all duties respecting the granting and issuing of patents” under the “direction of the Secretary of the Interior,” provides expressly and in detail for a regular course of examination; it provides expressly for a regular course of appeals from the primary examiners to the examiners-in-chief, from the examiners-in-chief “to the Commissioner in person,” and for a decision by him upon the right of an applicant to receive a patent; it does not provide expressly for an appeal from the Commissioner’s decision to the Secretary of the Interior, but it

does provide expressly for an appeal and revision of the decisions by this court, or for an original judicial proceeding by which relief against those decisions may be had. The provisions of appeal and relief constitute a system, and when the legislature provides such a system, we must suppose that it was intended to be complete and sufficient. As no part in that system was assigned to the Secretary of the Interior it cannot have been intended that he should have done so. Taken in connection with these provisions, his general power of "direction" must be construed to be a power to direct except when the Commissioner is authorized by the same statute to make "decisions."

We hold, then, that the attempted reversal of the Commissioner's decision by the Secretary, in the case before us, was unauthorized, and therefore a nullity; and that, consequently, the Commissioner, having finally adjudicated that the relators are entitled to a patent, improperly refused to issue the same. The writ of peremptory mandamus should accordingly issue as prayed for.

SIMEON J. GROOT ET AL. vs. FLORIAN R. HITZ ET AL.

EQUITY. No. 8239.

{ Decided April 14, 1884.
 { The CHIEF JUSTICE and Justices MAC ARTHUR and COX sitting.

1. Where the auditor files with his report alternative statements of an account, he should state which of them he considers the correct one and adopting that leave the parties to file their exceptions.
2. A suit brought by the ward on a guardian's bond, is barred by limitations if not commenced within six years after the coming of age of the ward. (Acts of Md., 1729 and 1798).
3. A judgment recovered against the administrator is not even *prima facie* evidence against the heir-at-law; the plaintiff must commence *de novo* against him upon his or her original cause of action, as if no suit had been instituted against the administrator, and the heirs-at-law are at liberty to make any defence that any one else could make to such new suit, including the defence of limitations.
4. The rule in regard to marshalling of assets does not apply to a case where a creditor, having originally, equally with all the other creditors, the right to proceed against the real as well as the personal estate of the debtor, loses by *lack* the right of recourse against the realty.

STATEMENT OF THE CASE.

This was a creditor's suit commenced by a bill in equity against the administrator of the heirs-at-law of Florian R. Hitz, deceased, having for its object to compel the distribution of personal estate among creditors *pro rata*, and to procure a sale of the real estate in order to supply the deficiency of personal assets.

The creditor's bill was filed by Groot on the 28th day of July, 1882, and on the 26th of October, the same year, Daisy F. Casparis filed her petition to be made one of the complainants in the cause, and the controversy before the court related entirely to her claim.

The circumstances out of which her claim grew, are the following: She was a minor, and John Hitz, her uncle, was appointed her guardian, on the 20th of April, 1869, and gave his bond as guardian, with Florian Hitz, his brother, as surety. On the 28th of September, 1874, the petitioner became 21 years of age. On the 9th of April, 1880, she instituted a suit on this bond against Florian Hitz, the surety.

He died intestate, and an administrator was appointed was made party to the suit in the usual way, and there finally a judgment for assets against the administrator. This was on April 4th, 1882. In July, as already stated, this original bill was filed, and in October of the same year the petition of Daisy F. Casparis was filed. The defendants, the heirs-at-law of Florian Hitz, by their guardian, filed a plea of limitations to the claim, and there was a general demurrer to this plea by the petitioner. The case was referred to the auditor who made two alternative statements of the administrator's account, and of the distribution of personal and real assets, in one of which he included the claim of the petitioner, and from the other he excluded the petitioner except to the account which excluded the claim, and the heirs to the other alternative statement.

ENOCH TOTTEN for Casparis.

1. The plea of the Statute of Limitations, interposed against the administrator, ought to be disregarded or stricken. It does not lie in the mouth of an administrator, who is a public officer, with duties defined and prescribed by law, and the first of them is to pay all the just debts of his intestate, if he have the means. The statute prescribes:

"It shall be the duty of all executors and administrators to pay all just claims against the deceased, exhibit them, or a just proportionable part thereof, according to the assets." Thompson's Digest, page 38, § 79.

This case does not come within the principle of the case relied upon in behalf of the heirs-at-law. The equity court had, by decree, declared that the assets were insufficient for that purpose, and had decreed that the realty should be sold to pay the debts. It had jurisdiction for this purpose for no other. This decree had been passed, and the sale had actually taken place. At the time when the case was referred to the auditor for the distribution of the proceeds, the sale had been finally ratified by the court, and the proceeds were in its hands, and constituted equitable assets for the sole purpose of paying the *just* debts of the intestate. D

vs. Ramsey, 1 Cr. C. C., 496; *Lynch, ex'r, vs. Yeaton*, 3 *Ibid.*, 482; *Black vs. Wilder*, 1 Atk., 420; *Brooks vs. Brooks*, 12 G. & J., 306; *Nelson vs. Bank*, 27 Md., 69, 1 Story Eq. Jurs., §§ 531, 547, 548, 551, 552; *Moses vs. Murgatroyd*, 1 John. Ch., 130; *Codwise vs. Gelston*, 10 John., 522.

The money, being equitable assets in the custody of the court for the especial purpose of paying the just debts of the intestate, will, by relation back, be considered by the court as converted into assets from the date of the decree, and this because such a retroactive operation "is required to advance the purposes of equity." *Belts vs. Wirt*, 3 Md. Ch. Dec., 113. This is with the rule of the common law which gives judgments entered during the term, relation back to the beginning of the term.

It will be found, upon an examination of the authorities cited in the brief in opposition, that the parties in each case mentioned, were proceeding directly against the realty for their own advantage. In this case, the petition of this creditor was filed, after the conversion, in contemplation of equity, of the realty into equitable assets. The equity court was bound to convert this realty into assets to pay the debts, because every man's property, real as well as personal, is bound for the payment of his just debts. After the conversion, the only question as to this creditor, was, whether or not her judgment debt was a "just" one. She did not pray for a sale of realty, because the sale had already been made; she could only ask for an application of a fund, created by the court for that purpose, to the payment of the debt due her.

"In equity, money directed to be laid out in land, will, before investment, be considered as land; and land directed to be sold and converted into money, will, before sale, be considered as money, and pass as such." *Leadenham vs. Nicholson*, 1 H. & G., 267.

The plea of the Statute of Limitations in this particular case should not be regarded with favor. The action at law was instituted long before the statute had run. The default of the guardian or the breach of the bond was not declared

until the 2d day of April, 1880, when he rendered his final account, showing a balance due to his ward of \$5,194.25, and the action was instituted on the bond on the 9th of the same month. If the intestate had not died, there would have been no obstacle in the way of making his realty respond. Can a just debt be cancelled by the death of the debtor who leaves a large estate in realty? Will a court of equity go out of its way to uphold such a doctrine? The Court of Appeals of Maryland, in a kindred case, and upon this very subject of the accident of death, uses the following language:

"If relief in the mode in which he has now sought it be denied to the appellant, he is wholly without remedy. And what is it that has placed him in this lamentable condition? The simple accident that, before payment of his claim has been ordered, and notice given and demand made, the trustee has departed this life. To place himself in a condition to assert his rights in a legal forum has, by that accident, become impracticable. Can a stronger case than that now before us, for the interposition of a court of equity upon one of its well-established heads of equitable jurisprudence, be well imagined?" *Brooks vs. Brooks*, 12 G. & J., 320.

The statute laws in force in this District are ample to prevent the abatement of actions at law, and to carry them on for or against administrators. See *Thompson's Digest*, 1, R. S. U. S., sec. 955.

2. Should the court feel bound to sustain the position taken in behalf of the heirs-at-law, then this creditor is entitled to all the assets in the hands of the administrator; or, in other words, she is entitled to have the funds marshalled, and to have the \$1,206.44 in the hands of the administrator wholly applied to the payment of her judgment.

This is upon the well-known principle of equity, that where some of the creditors of an estate may resort, for the satisfaction of their debts, to either of two or more funds, whilst others are confined to one only, a court of equity will marshal the funds and thus enable those who are confined to one fund to receive due satisfaction. Equality is equity. 1 Story's Eq., §§ 547, 557, 558, 559.

EDWARDS & BARNARD for defendant:

1. *The claim of the petitioner is not sustained by any competent proof.*

The allegations in the petition, and the short copy of the judgment against John Hitz showing also a finding of the jury against the administrator of Florian Hitz, for the amount stated, attached to said petition as an exhibit, are relied on by the petitioner to establish her claim against these infant heirs.

This proceeding is controlled and governed by the local law of the District of Columbia.

That law makes the proceedings against the administrator and the heir, when the latter proceeding is necessary, entirely independent of each other. The duties of the administrator are confined to the personal estate, and never beyond it. If that be insufficient to discharge the debts, and it be necessary to resort to the realty of the deceased for that purpose, a proceeding against the heir must be instituted. In that event, whatever has been done by the administrator is without effect as to the property sought to be charged. A judgment against the administrator is not evidence against the heir. The demand must be proved in all respects as if there had been no prior proceedings to effect its collection; and the Statute of Limitations may be pleaded with the same effect as if there had been no prior recovery against the personal representative. *Ingle vs. Jones*, 9 Wall., 495; *Keefe vs. Malone*, 3 Mac Arthur, 236; *Drummond vs. Green*, 35 Md., 148; *McDowell vs. Goldsmith*, 24 Md., 214; *Collison vs. Owens*, 6 G. & J., 4; *Duvall vs. Green*, 4 H. & J., 270; *Byerly vs. Staly*, 5 G. & J., 432; *Warfield vs. Welch*, 3 G. & J., 259.

The original bond of the petitioner's guardian is the foundation of her claim in this proceeding against the heirs of one of the deceased sureties. This bond is not now produced, or a duly certified copy thereof filed or offered in evidence, or the absence of the original in any manner attempted to be explained or accounted for; nor is there any evidence that it was approved by the court or register as required by

law. No administration (guardian) bond is binding unless first approved by the court or register. Md., 1798, ch. 101, sub-ch. 3, sec. 1; *Crawford vs. The State*, 6 H. & J., 231.

2. *The plea is good, and should be sustained.*

"All actions upon administration and testamentary bonds shall be commenced within twelve years after the passing of the said bonds, and not after." Md., 1729, ch. 24, sec. 21.

"Nothing in this act shall be construed to bar any person within the age of twenty-one years, *feme covert*, *non compos mentis*, or imprisoned, or persons beyond seas, from bringing an action or actions within six years after their coming to or being of full age, uncovert, sound memory, at large, or returned from beyond seas, upon any administration or testamentary bond." *Ib.*

By the testamentary act of 1798, chap. 101, sub-ch. 12, sec. 4, it is provided that the bond of a guardian "shall be recorded, and be subject to be put in suit, and be in all respects on a footing with the bond given by an executor or administrator."

A guardian's bond, as respects the plea of limitations, is, by the act of 1798, ch. 101, sub-ch. 12, sec. 4, placed on the same footing with testamentary and administration bonds, and the term within which suits must be brought on guardian's bonds, according to the act of 1729, ch. 24, sec. 2, is twelve years after the passage of the bonds. *The State vs. Green*, 4 G. & J., 381.

This bond is dated April 20, 1869, and the statutory period within which an action thereon could be brought expired April 19, 1881. The petitioner attained her majority September 28, 1874, and she had, under the law, six years thereafter within which to bring her action, viz., until September 27th, 1880, even if the bond had been of more than twelve years standing when she became of age, and competent to sue; the six years exemption in her favor having expired before the bond became *functus*, she had until April 19, 1881, within which to bring her action thereon. She brought suit against the deceased surety in his lifetime, while the bond was in force, to wit, April 9,

1880, which abated by his death before judgment, and was not revived against his administrator until July 14, 1881, some time after the bond was extinct.

The claimant's petition, however, was not filed in this cause until October 26, 1882, which, under the authority, so far as concerns the heirs, was the commencement of the action; this was more than twelve years "after the passing of the bond," and is barred by the express language of the statute.

The statute runs down to the time the claim is filed in the cause, that being regarded as the time of the commencement of the suit with respect of such claim. *Hall vs. Ridgely*, 33 Md., 318; *Abrahams v. Myers*, 40 Md., 499; *Ohio Life Ins. and Trust Co. vs. Winn & Ross*, 4 Md. Ch. Dec., 252; *McDowell vs. Goldsmith*, 2 Md. Ch. Dec., 370. (Affirmed in 6 Md. Rep., 319.)

This being the law, it is immaterial whether the petitioner was born September 29, 1853, or on the same day and month in 1855. In either event the statute was a bar to her action commenced, as stated, October 26, 1882. In the one case the claim was barred April 19, 1881, in the other, September 28, 1882.

3. *The exceptions of the petitioner should be overruled, and those of the defendants sustained, and the petitioner declared not entitled to receive any portion of the proceeds of the sales not awaiting distribution.*

The principal points raised by petitioner's exceptions are:

First. That she is a judgment creditor of Florian Hitz, deceased, and entitled to priority in the settlement of her claim over that of the National Metropolitan Bank, because the latter is a mere simple contract creditor.

Second. Because the assets of said deceased surety, including the proceeds of the sales of the real estate, are not marshalled, so that in case she be not entitled to participate in the distribution of the proceeds of said sales, she is then entitled to be paid in full out of the funds which came into the hands of the administrator.

The first point is clearly untenable. A judgment for

assets against an administrator has no priority over a simple contract creditor, even in the administration of the personalty. Md., 1798, ch. 101, sub-ch. 8, sec. 17; *Byrely's Ex. vs. Staley*, 5 G. & J., 432.

Neither can the second point be maintained. If the claimant be allowed to absorb the personalty, she would throw the other creditors, whose debts are not barred, on to the realty, and thereby indirectly establish a claim against the heirs expressly barred by the statute.

The rule that where one of two creditors has a lien and the other has not, the latter can compel the former to resort to his lien, in order that the general creditor may be paid off out of the other assets of the debtor, is not applicable here. *Collison vs. Owens*, 6 G. & J., 8.

It is submitted that the plea should be sustained, the claim of the petitioner disallowed, and the fund in the hands of the trustees distributed in accordance with the schedule marked C accompanying the auditor's report.

Mr. Justice Cox delivered the opinion of the court. After making the foregoing statement of the case, he proceeded:

It should be remarked here that there is an irregularity in the form in which the auditor has made his report. He files alternative statements of account, but does not adopt either as his report. The proper way is for him to decide which statement is correct and adopt that, and allow it to be excepted to. That is, however, not very material.

The whole question turns on the defence of the Statute of Limitations to this claim of Daisy F. Casparis. The law upon the subject is found in the act of assembly of Maryland of 1729 and the additional one of 1798, the testamentary act. The first provides, that—

“All actions upon administration and testamentary bonds shall be commenced within twelve years after the passing of the said bonds, and not after.”

Guardians' bonds are put on the same footing by the act of 1798. Then there is this provision in the same act of 1729:

“Nothing in this act shall be construed to bar any person

within the age of twenty-one years, *feme covert*, *non compos mentis*, or imprisoned, or persons beyond seas, from bringing an action or actions within six years after their coming to or being of full age, *uncovert*, sound memory, at large, or returned from beyond seas, upon any administration or testamentary bond."

The bond in this case is dated April 20th, 1869, and the present suit was commenced July 28, 1882, which was nearly thirteen years after the date of the bond, or "after the passing" of the bond, in the words of the act of assembly. On the face of it it would appear to be barred by the Statute of Limitations. There is a question as to the date of the birth of this petitioner, and whether she does not come within the exception of persons *under age*. It is claimed, on her part, that she was born in the autumn of 1854, and by the defence it is claimed *MIL* was born in September, 1853. If the former were true, then the suit was brought within the time, because the six years would not have elapsed after she became of age. But we are satisfied that the weight of testimony shows very clearly that her birth was in 1853, so that she came of age on the 28th of September, 1874. She then had not only six years, but seven years after she became of age for the institution of this suit, before the twelve years of the life of this bond had expired. So that this exception does not avail her anything.

The petition of Daisy F. Casparis proceeds upon the theory that she had recovered a judgment, and that that judgment is her cause of action; that the judgment is good against the real estate, the real assets, as well as against the administrator. But it is perfectly well settled in this jurisdiction, by the Court of Appeals of the State of Maryland, and by a decision of this court, in *Keefe vs. Malone*, 3 Mac Arthur, 236, and, above all, by a decision of the Supreme Court of the United States, in the case of *Ingle vs. Jones*, 9 Wallace, 495, that a judgment recovered against the administrator is not even *prima facie* evidence against the heir-at-law, but the plaintiff must commence *de novo* against the heir upon his or her original cause of action, as if no suit had been instituted against the

administrator. Not only that, but the heirs-at-law are at liberty to make any defence that any one else could make to such new suit, and, among others, the defence of the Statute of Limitations. It, therefore, seems to us very plain that the defence of limitations must be sustained.

Another point made on the part of the petitioner is that these assets ought to be *marshalled*; that is to say, that inasmuch as she has no recourse against the real assets, and the other complainants have against both personal and real the latter ought to be excluded from participation in the personal assets, and these should be applied to her claim and the other creditors thrown on the proceeds of the real estate. The rule undoubtedly is that if one creditor has a lien upon, or has a resort to, two different funds belonging to the debtor, and another one may only resort to one of them, the law, in order to save the latter, will throw the creditor having the larger and more ample remedy on the fund not common to both, in order to save the other debt. But that hardly applies to a case like this. This is a case in which all the creditors have, at law, a similar recourse to all parts of the debtor's estate, and one of these creditors lost it by her own laches. That is, she had as much right as these other claimants to proceed against the real assets but failed to bring her suit in time. We never have known a case where the law marshalling assets applied to a case like that, and the contrary is laid down by the Lord Chancellor, in 10 Hare's Reports, 229, in the following language

"It is said next, that under the doctrine of marshalling the right of the plaintiffs must be considered to subsist for the period of twenty years; and *Vickers vs. Oliver and Gibbs vs. Ogier* are relied on upon that point. But upon examining the case of *Vickers vs. Oliver*, it will, I think, be found that the judgment does not at all bear out the marginal note as to the simple contract creditor not being barred by the lapse of less than twenty years; and in *Basby vs. Seymour* (1 J. & L., 527), that case seems to me to be referred to the true ground on which by the judgment it was rested. And with reference to the case of *Gibbs vs. Ougier*, it goes

no further than to decide that the court will marshal the assets, although the right to marshal may not be distinctly raised by the pleadings; it does not at all affect the question which arises in the present case, whether the court will do so at the instance of a plaintiff whose immediate right against the real estate is barred by the Statute of Limitations. I can find no authority which goes to that extent. Simple contract creditors have now a direct right against the real estate in case of a deficiency of the personal. They do not require the aid of this court to marshal the assets in order to give them a remedy against the real estate; and for whatever purpose the doctrine of marshalling may be necessary to be kept on foot, I do not think that it ought to be kept alive for the purpose of giving indirectly a right which could not be asserted directly. The consequence would be that, in all cases where there are any specialty debts, the simple contract creditors would be entitled to sue the real estate at any time within which the specialty creditors could have sued; in effect, to create in equity the same limitations as to simple contract debts as the statute has prescribed as to specialties."

It does not seem, therefore, that the doctrine of marshalling could apply to this case, and we must, therefore, sustain the exceptions of the defendant to the alternative statement made by the auditor in which the claim of this petitioner is allowed, and overrule the exception of the petitioner to the other alternative statement from which it is excluded. The case was certified to be heard here in the first instance, and the order will have to be drawn in that form.

THE CHIEF JUSTICE. We are unanimous in this opinion, although it involves a very great hardship. This estate belonged to a party who died pending a suit against him in a court of law, and the law steps in and says that the suit shall not abate, but survive, and directs that the administrator shall be made a party to it, and the suit proceed to judgment. In the meantime the heirs assert their estate in

the real property of the deceased, as they have a right to do, subject to the incumbrances and the indebtedness of the intestate. At the same time the plaintiff proceeds to judgment, and gets it—a judgment which if it had preceded the death of the party twenty-four hours would have been a lien upon all this real property. But inasmuch as the defendant did not live to the end, instead of the right of action surviving, it really only partially survives, that is to say you have the interposition of a statute which says that a judgment against an administrator shall only go into effect against the personal assets of the intestate. It seems to me this is a solecism in legal remedies. First, the law declares that a party's rights shall not be forfeited by death, but shall survive, and they do survive, but they do not take effect on the substance of the defendant. In the meantime the heirs, who derive all their estate through and in subordination to the claims of the defendant in judgment, take possession of the substance and leave the cast-off shoes of the estate to the creditor. Now, that is reversing the general proposition that inheritors of property take it *cum onere*; under this statute they take it absolved, absolved of debts created by the intestate, debts that are anchored in the substance and created on the faith of the property of the party. Still I do not know how we can render any other decision in this case under the light of authority as it exists, than the decision which has just been pronounced. I have been, myself, fighting this incongruity earnestly, in the interest of sensible construction, but I cannot escape the duty of uniting in this opinion under the circumstances, for the express authority is that this judgment under no circumstances takes effect on other than personal assets of the deceased. That is the line of authority beyond question, and especially in this jurisdiction. But in establishing that line of authority, both in legislation and upon the bench, evidently the protraction of the right of survival of the action, with all its energies, in the execution which is to issue on the judgment has been overlooked, or to that extent it does not survive; it is merely protracted to hunt after the per

sonalty of the deceased. It is a fraud, legal, not judicial, for it comes from the law makers; the judiciary have nothing to do with it. It is dogmatically provided by the legislative authority that you shall only have judgment against the personal assets of the decedent as against an administrator, and under the language of the statute I do not know how the courts can decide other than they have done.

Mr. Justice MAC ARTHUR: While I give my assent to the decision which has been announced, I must acknowledge that I sympathize with almost every expression that the Chief Justice has just uttered. I think this case demonstrates that there should be exceptions made to a general principle of law which, as a general principle, may be very proper in its application, since no general principle can exist without inflicting, in special instances, great inconvenience, and, perhaps, apparent injustice. This, I think, is one of those cases, and that is the reason why I am in accord with the views expressed by the Chief Justice.

As has been stated, the action in this case was commenced in the lifetime of the ancestor, and he died before it was perfected in judgment. Of course, the general principle comes in that a judgment against the administration is not evidence against the heirs. But we all know, and all concede, that that was a personal action, and that the heirs are interested in the personalty as much as in the real estate, and why they should be considered as being represented by the administrator in relation to one kind of property and not in relation to the other kind of property, appears to be a mere figment of the brain. But such is the law.

If the action had been commenced against the administrator instead of against the party himself, there might be less objection to the denial of justice. But that was not the case. This young woman commenced her suit before the statute had run against it, and she did all she could to get judgment against the man who, unfortunately for himself as well as for this woman, died.

Another special circumstance in this case which ought to

make it an exception to the application of the rule, if that were possible—and I certainly would make an exception on that ground if I could—is the fact that a creditor commence his suit upon his claim. The court took possession of the suit, pronounced a decree for the sale of this real estate, sold it, took the proceeds into its possession in the form of personal property, and just at this stage of the proceeding, the woman comes in with her petition for the purpose of sharing in the distribution of that personal property. But the last steps in again with its general principle, and says that although it has been converted into personal property, in contemplation of law, it is still real estate and must go to the heirs. So that this party who has prosecuted her claim throughout as well as she could, has been, by circumstance swindled out of her claim. I wish that the Chief-Justice and myself could make an exception to these general principle and take hold of this case by main strength, but I do not see how we can do it.

TRUSTEES OF THE GERMAN LUTHERAN EVANGELICAL CONCORDIA
CHURCH,

vs.

JOHN W. EBBINGHAUS, Trustee.

{ Decided April 24, 1884.
{ The CHIEF JUSTICE and Justices MAC ARTHUR and COX sitting.

EQUITY. No. 5688.

The German Evangelical Concordia Church were dispossessed of property under a decree and writ of assistance of this court. An appeal was taken to the Supreme Court of the United States, where the decree was reversed. The mandate directed to this court described the appellants as the German *Lutheran* Evangelical Concordia Church, and under this title they applied to this court for a writ of restitution to restore them the possession. *Held*, That the record showed no such party to the suit, and that the writ must be refused; but it *seems* that if the petitioner had shown itself to be the successor to the German Evangelical Concordia Church, the writ would have issued.

THE CASE is stated in the opinion.

HENRY WISE GARNETT and CONWAY ROBINSON for complainants.

F. P. CUPPY and P. E. DYE for defendant.

Mr. Justice MAC ARTHUR delivered the opinion of the court.

In the case of the Trustees of the German Evangelical Concordia Church, appellants, vs. John W. Ebbinghaus, trustee, the bill was dismissed at the special term. That decree was reversed in the General Term, and an appeal from the decree of the General Term was carried to the Supreme Court of the United States. It appears that this court issued a writ of assistance, putting Ebbinghaus in possession of the lot, which is the subject of the suit. After he had been put into possession, the case was reversed in the Supreme Court, and this is an application for a writ of restitution to restore possession to the German *Lutheran* Evangelical Concordia Church, who complain that they were the parties that had been dispossessed by the writ of assistance.

We have come to the conclusion that this church was not a party to the record, and for that reason the motion must be denied. The case was argued quite elaborately, and per-

haps it would be unfair to the counsel as well as to the court to dismiss it simply without intimating our views with reference to the legal principle involved, so that the parties may know how to guide their future conduct for the purpose of enforcing what they claim to be their rights to the premises.

The complainant, Ebbinghaus, filed a bill claiming to have a legal title to this lot of land, designated as number nine, in square eighty. He says that it was donated to Jacob Funk, in the latter part of the last century, for the use of the German Calvinist Society. He claims to be the trustee, having succeeded to the original trustee by a decree of the court appointing him for that purpose. He names two religious societies defendants in his suit, and he alleges that both claim to be the legal beneficiaries in this tract. One of these societies is the First Reformed Church. The First Reformed Church is declared to be the legal successor to the German Calvinist Society. So that we may dismiss the latter society, as such, for the time being, and consider the real defendant as substituted for them, the First Reformed Church.

The other religious society named in the bill, is the German Evangelical Concordia Church. Those are the two defendants, and Ebbinghaus claims the possession of the lot and that these two societies should interplead. He alleges, however, that the German Evangelical Concordia Church has been in possession, receiving rents and profits, and that the First Reformed Church he expects will bring a suit against him. So he prays for an injunction and an account. The bill was treated in the first instance as beyond the jurisdiction of an equity court, and dismissed. It was treated in the general term as a bill in the nature of a bill of interpleader, and Ebbinghaus was declared entitled to the possession of the lot and the German Evangelical Concordia Church was decreed to account. It was after that that the writ of assistance issued to put Ebbinghaus in possession.

It is essential in the first place that we should determine who took the appeal to the Supreme Court of the United States.

States. And we premise that by saying that there is nothing in this record at all to show that any other society was ever made a party to the suit. There is no suggestion on the record; no party ever made an application to be introduced into it; and no party was ever made, formally, a party to the record except the parties named in the bill originally. The trustees of the defendant, the *German Evangelical Concordia Church*, were Killian, Schenk and Schneider, and the entry which we find immediately after the decree of the general term reads "And from this decree, the defendants, Killian, Schenk and Schneider, trustees, etc., pray an appeal to the Supreme Court of the United States." So that the case was absolutely carried by an appeal into the Supreme Court by the trustees of one of the defendant societies, and the proceeding was all regular down to that point.

Now the mandate comes back reversing this decree. It begins by a recital: "Whereas lately in the Supreme Court of the District of Columbia, and before you or some of you, in the case between John W. Ebbinghaus, Trustee, complainant, and John G. Killian *et al.*, Trustees of the *German Lutheran Evangelical Concordia Church*, and August Seivers *et al.* who were the trustees of the First Reformed Church," etc. Well, there was no such party in this record as the *German Lutheran Evangelical Concordia Church*. The decree of the Supreme Court is not in favor of the trustees of the *German Evangelical Concordia Church*, who were parties to the suit, but of a society who was not a party to the suit.

The counsel who presented this motion finds a reason for saying that the Lutheran Church was really a party to the suit from a statement made in the decree of the General Term, which reads as follows: "And this court being of the opinion that the said John W. Ebbinghaus, as trustee under the appointment of this court to have and possess the said lot nine in square eighty, for and on behalf of the trustees of the First Reformed Church of the city of Washington, and that the said Ebbinghaus, as said trustee, is enti-

tled to have an account of the rents and profits, etc., (describing it) of the Concordia Church building whether received by said trustees or authorities under the name of the German Evangelical Concordia Church, or as the trustees of the German Lutheran Evangelical Concordia Church."

How this name Lutheran got sifted into this decree is unexplained. We have gone through the testimony very carefully to see if there was any explanation about it, and there is none, or that the trustees of the Evangelical church, were ever recognized as the trustees of the Lutheran Church. So that there is evidently a mistake; upon the cover of the transcript of the record which went up, the complainant is called the German *Lutheran* Evangelical Concordia Church, so that the Supreme Court was probably misled by the title page of the book.

Although we deny the motion, we take occasion to affirm strongly the right of this court, upon the coming back of a reversed decree from the Supreme Court, to restore a party to the possession of real estate whom we have dispossessed under our erroneous decree. And I do not know but in this case if the motion were accompanied with an application setting forth that the Lutheran Church was the legal successor to the Evangelical Church, and had succeeded to all their rights of property, etc., that we might put it back; but the motion is simply to put the Lutheran Church in possession without any explanation of its right to its possession. We therefore think it would be impossible for us to grant this writ without making a new decree, without a single particle of testimony before us to show that they are entitled to it. We think the motion on every consideration must be denied, but without prejudice. It strikes me that the proper course would be to give the Supreme Court itself, where this error commenced, an opportunity to correct it and then the proceedings would follow on regularly, and if these parties are the successors of the Evangelical Church to the rights of property, they would be entitled to be put into possession, and not otherwise.

Mr. Justice Cox said:

I only wish to observe in this case that I am perfectly satisfied that all the parties who were ejected under the process of this court are entitled to a writ of restitution. The only difficulty I have is that the papers do not show the moving party here to be identical with that party. I think that the applicant should file a petition setting forth the fact that pending this suit the parties named in the original suit as defendants were incorporated under this new title and the parties having this new title succeeded to their rights. Upon such a petition verified it would be our duty to issue a writ of restitution. I am not prepared to say anything about the proceedings of the Supreme Court. It may be right enough, but I think the other remedy is open to the parties.

ALEXANDER R. SHEPHERD, ANNA V. MOSS, AND ISAAC T.

FILBERT

vs.

JOSEPH F. BROWN, MARIA V. BROWN AND ALEXANDER SHARP.

EQUITY. No. 5319.

{ Decided July 5, 1884.

{ The CHIEF JUSTICE and Justices MAC ARTHUR and JAMES sitting.

1. A judgment creditor filed a creditor's bill for the purpose of subjecting the equitable interest of the debtor in certain real estate to the satisfaction of the judgment. A decree was made, and the interests ordered to be sold. After this the judgment creditor assigned the judgment, and shortly afterwards the assignee, instead of enforcing the sale, entered an order dismissing the suit.

Held, That by dismissing the suit, the property was discharged from the lien created by the decree, and that the lien of the judgment was also discharged from such other property of the defendant as had been conveyed away by him.

2. B, being in apparently independent circumstances, settled upon his wife certain property to be held as her separate estate; soon afterwards, he became largely indebted.

Held, That in the absence of explanation as to the cause of this indebtedness, the natural and inevitable inference must be that the indebtedness existed contemporaneously with, if not anterior to the settlement.

3. Where the wife pays her husband's judgment creditor, and has the judgment marked to her use, the court will, on proper application, direct it to be entered satisfied, when it appears that the money paid by the wife to the judgment creditor was the money of the husband.

THE CASE is stated in the opinion.

WM. F. MATTINGLY and A. C. BRADLEY for plaintiffs.

T. T. CRITTENDEN and FRANKLIN H. MACKEY for defendants.

Mr. Justice MAC ARTHUR delivered the opinion of the court.

The case of *Shepherd et al. vs. Brown et al.* is a bill to restrain an execution at law.

Joseph F. Brown was the owner of two lots in square 101, and on the 18th day of May, 1870, he and his wife executed a deed of trust to one Whitney to secure the payment of an

indebtedness. Whitney died, and William B. Webb, by a process in equity, was appointed in his place to execute the trust, which he did by advertising the property, default having been made in payment of the debt, and Mr. George Mattingly became the purchaser. Mattingly conveyed to Fay, and there were two or three other conveyances before the property finally passed into the hands of Shepherd. Shepherd took the two lots and divided them into three, and conveyed one to Anna V. Moss and one to Isaac T. Filbert, his co-complainants, and retained the other himself. At the time the lots were unimproved, but they have since been improved by buildings.

In February, preceding the May on which the trust deed was executed, the Ocean National Bank recovered a judgment against Brown for \$15,000; so that there appears to have been a trust and a judgment upon this property. A payment was made upon the judgment of \$5,000. An assignment to the use of one Donnelly for the sum of \$4,000 was also made, and, finally, on the 4th of March, 1872, Mrs. Brown, the wife of the defendant, obtained an assignment of the judgment, and subsequently entered a credit upon it for \$7,355.

I ought to have stated that the Ocean National Bank issued an execution upon the judgment, which was returned *nulla bona*. The bank filed a creditor's bill for the purpose of subjecting the equitable interest of Brown in some real estate in the District to the satisfaction of the judgment. A decree was made in favor of the bank in that case, and these interests were ordered to be sold. Mrs. Brown, when she took the assignment of the judgment, dismissed Mr. Wilson, who had been the attorney in the bank case, and substituted her own attorney in his place. She then entered an order dismissing the suit. By dismissing the suit she, of course, discharged the lien which had been created by the decree in that case, and she also released thereby the lien of the judgment upon the lots which were embraced in this bill.

Now, it is contended, on the part of the plaintiffs, that

this discharge of the liens in favor of the judgment created by the decree in the equity suit, has operated to release the lien of the judgment upon their lots, and that she has forfeited her right to enforce the execution against complainants.

One other point was made, that when that sale took place after paying the indebtedness and the expenses of the sale there was a small surplus left, for which Mr. Mattingly, who was the purchaser, executed his notes to Mr. Brown. It appears that Mr. Brown transferred them to his wife, and Mr. Mattingly finally settled the amount of these notes with Mrs. Brown herself. There being some back tax that had been overlooked, an arrangement was made by which that was deducted from the purchase money, and the remainder was paid to Mrs. Brown. It is contended that she is not estopped from saying that that judgment was any longer a lien after it had been sold upon the trust deed, and she had realized the balance.

This point is not without a good deal of force, but perhaps it is not entirely necessary for us to decide that point in this case, because there is still another view upon which we think this bill may be sustained in addition to the first one which I have mentioned.

It was contended by the counsel for the complainant that the money with which Mrs. Brown paid the judgment was the money of the husband, and that instead of taking an assignment, she should have satisfied it. If this is true we are unanimously of the opinion that it was a payment on the judgment, and not a purchase. This depends upon some circumstances that it may take me a few moments to state.

As far back as 1868, it appears that Mr. Brown was a man of considerable property. At that time he purchased the estate called "Clifton," a property within the District, for \$40,000. He paid the consideration and directed the conveyance to be made to Mrs. Brown, which was done. At that time, as I have remarked, Mr. Brown appears to have been a man possessed of a good deal of property. Judgments to the amount of between three and four thousand

dollars existed against him; but if, as is claimed, he was then worth about seventy or eighty thousand dollars, the disproportion between his means and his debts would not invalidate a settlement on the wife.

It appears, however, that pretty soon after this, an immense indebtedness was developed against Mr. Brown, and Mrs. Brown began rapidly to acquire the interests of her husband in all his property. For instance, at the time that she discontinued the equity suit and released the lien of the judgments, a loan was negotiated with the Freedmen's Trust Co. for \$35,000, and a trust was executed upon the lots released for the security. It appears that \$18,000 of the \$35,000 was used for the purpose of redeeming property that had been under some trust executed by Mr. Brown, and the property was conveyed to Mrs. Brown. It appears also that Mr. Van Riswick had purchased some property, real estate, of Mr. Brown, at a sale in an equity suit. It appears also that property was sold under a trust deed by Mr. Jones and bid in by her. There was a surplus of some \$1,700 over and above the indebtedness and the expenses, which was directed to be paid also to the wife. A house and lot was conveyed to a man by the name of Stout, for which he executed his notes amounting to \$2,000. But that was a mere nominal transaction, as he never expected to pay them, and never did pay them. Afterwards he conveyed this property to Mr. Rohrer, and his notes were returned to him, Rohrer conveying back to him, however, a house and lot, which he immediately transferred to Mrs. Brown.

And so the conveyances and interest were acquired by Mrs. Brown from time to time. All these transactions were upon continued declarations that this arrangement was for the purpose of applying Mr. Brown's property to the payment of his debts, and no doubt that was the intention of Mrs. Brown in taking the conveyances, and her declaration to Mr. Jones that she had concluded to take the business into her own hands, was correct.

It appears that Mr. Brown had, from some cause or other, become incompetent to take charge of his property, and Mrs.

Brown assumed the business part connected with the estate.

At the time the release was executed upon the lots embraced in the equity suit, another lien was also released, said to be worth \$10,000, of which Mr. Crittenden had at some time been the holder.

All these transactions, we are of opinion, could be investigated by a creditor of Mr. Brown. Shepherd, however, is not in the condition of a creditor, and, therefore, the allegation of the bill that these conveyances were fraudulent perhaps presents no point of which he can take advantage because he does not stand in the situation or relation of creditor. But we think all the transactions may be referred to in this case, simply for the purpose of showing that from first to last it was the property of the husband that went to the payment of all these debts, the judgment among the others.

The reply to this is, that the property which Mrs. Brown acquired in 1868—the Clifton property—was her separate estate; that upon that estate she negotiated a loan with the Freedmen's Bank of \$20,000, for the purpose of paying the judgment; but instead of paying it, as I have said, she took an assignment. It seems improbable that so soon after 1866 the development of such a great burden of debt against Mr. Brown could have sprung up without any previous obligation on his part. There is no explanation at all given of Mr. Brown's business, or how he became embarrassed to the extent of that indebtedness after 1868; and we think it is not only a natural, but an inevitable inference, that the great indebtedness which is the excuse for these transfers of property, and which was the cause of so much embarrassment to Mr. Brown, existed contemporaneously with, if not anterior to, the conveyances of the estate to Mrs. Brown.

We are, therefore, of the opinion, on the two points which I have elaborated, to wit, the first and last, that the prayer of this bill should be allowed; that the judgment upon the property should be entered satisfied so far as the complainants are concerned, and a decree to that effect may be prepared.

BROOKE MACKALL, JR., vs. ALFRED RICHARDS ET AL.

EQUITY. No. 8118.

} Decided July 5, 1884.

} The CHIEF JUSTICE and Justices HAGNER and COX sitting.

1. An execution sale will be set aside where the description of the property, both in the advertisement and in the marshal's deed, is so vague and uncertain that it is impossible to ascertain what property was sold and conveyed.
2. The rule on the subject of boundaries is, that if a deed calls for a line to run to a fixed boundary or a fixed line, the description of the distance, inconsistent with that call, must yield to the call.
3. It *seems* that where the description in the marshal's deed is a departure from the description in the advertisement of sale, the deed is void.

THE CASE is stated in the opinion.

W. WILLOUGHBY for plaintiff.

WM. B. WEBB for defendant.

Mr. Justice COX delivered the opinion of the court.

This was a bill filed to set aside a sale made by the marshal of the United States, in virtue of executions issued against the complainant, upon several judgments. The marshal undertook to sell a part of lot 7 in square 223, situated at the northeast corner of that square, at the intersection of New York avenue and Fourteenth street.

The bill claimed that all the proceedings were irregular and that the sale was absolutely void. If the complainant had had the legal title vested in him at that time of course the remedy would have been at common law. He could have instituted an ejectment, and would have had no ground for coming into a court of equity.

It happened, however, that Brooke Mackall, sr., the father, had previously conveyed the legal title to this property to his son, Leonard Mackall, in trust for such person as he should thereafter designate, and shortly before his death he made a deed conveying his equitable interest in the property to Brooke Mackall, jr., and directed the trustee to convey it to him. But Leonard Mackall refused to do so. Therefore the complainant was in a position where he could not in-

stitute a suit at law himself or compel the trustee to do so, and was compelled to come into a court of equity to get relief from what was said to be a void sale.

The bill was dismissed below. On appeal here, when it came on for argument, the court's attention was called to the fact that there was also pending in this court another suit between Brooke Mackall, jr., as defendant, and the other heirs of Brooke Mackall, sr., in which the title to this very property was litigated, as between them. And it was suggested that even if the court should find that Brooke Mackall, jr., was entitled to the relief claimed as against Richards, it might afterwards turn out, in the other case, that he was not the right party to have the relief; that the parties really entitled in equity to the property were the other heirs of Brooke Mackall, sr. Therefore it was suggested that either they ought to be made parties to this suit, or the determination of this case should be deferred until the other case should be decided, and this latter view was acquiesced in by the court.

The case was, therefore, taken under advisement, until the determination of the case between the co-heirs. Lately, the other case has been argued before this court, composed at that time of the Chief Justice and Justices Wylie and James, and they have virtually decided that the complainant in this suit, that is, Brooke Mackall, jr., was, as against his co-heirs, entitled to this property. That, therefore, removes a difficulty in the way of disposing of the present case.

The present case, Brooke Mackall, jr., *vs.* Alfred Richards and Leonard Mackall, was heard by the Chief Justice, Justice Hagner and myself. The bill attacks the sale made by the marshal, on various grounds. For example, it is claimed that some of the proceedings on which judgments were obtained, and executions issued, were proceedings in the way of enforcing a mechanic's lien, and were conducted at common law and not in equity, as the law required. In some of them, there was a mere personal judgment against Brooke Mackall, and yet the execution was issued against

specific property, describing it. Then, again, it was said that the executions were issued to one marshal, and sale was made by another marshal under the same writ, without having it returned and a *venditione exponas* issued, &c. Then, again, that the description in the marshal's advertisement and his deed were so vague that it was impossible to ascertain what property was sold or conveyed.

We have considered these various objections, and without disposing of any of the others, we have come to the conclusion that the sale cannot be sustained, on account of the patent and palpable ambiguity and uncertainty in the description of the property, both in the advertisement and in the marshal's deed.

The marshal advertised it by the following description: "Beginning at the N. E. corner of the square; then running S. 44 feet; thence W. to the *west end* of the lot; thence on the west line of the lot northward to the north line, and thence to the beginning."

There is nothing incongruous on the face of this description, but when we come to apply it, we find it to be a misdescription. For instance, the line running west from the end of the 44 feet, measured south, on Fourteenth street—interpreting that to mean *due west*—instead of reaching the west end, intersects the north line at a remote point from the west end, making a little triangular space which was never in contemplation by the parties. The rule on the subject of boundaries is, that if a deed calls for a line to run to a fixed boundary or a fixed line, the description of the distance, inconsistent with that call, must yield to the call. And, therefore, it is true that the word "west" must be rejected from this description entirely because it was inconsistent with the call "to the west end of the lot." But if we reject the word "west," then we have a patent ambiguity which is unsusceptible of any explanation at all. It will then read, "beginning at the N. E. corner of the square; then running S. 44 feet; thence westerly to the west end of the lot, and thence northwardly to the north line," &c. Where is it to strike the west line? The course is not given at all.

It may strike it within one, ten, or fifty feet of the line. It is left perfectly ambiguous. It is impossible to locate a lot thus described.

If this description were contained in a deed from a grantor to a grantee, the first thing for the grantee to do would be to file a bill to have the deed reformed so as to conform to some previous contract between the parties. But here it is a judicial sale made by a public officer who has not a contract with the vendee at all, except what is contained in the public advertisement or deed. These convey and describe the thing or nothing, and the something is made so uncertain that it amounts to nothing. It is impossible to say, what a jury could ascertain, what lot was intended by this description. It is not the function of parol evidence to correct this. Parol evidence may be received, not to show what the parties intended to say in addition to or differently from what was expressed, but to show what the language expressed really meant. It may introduce light on that question by the surrounding circumstances.

But there is nothing by which this deed could be corrected. It is absolutely void upon its face. Both the advertisement and the deed are ambiguous. The deed purports to be a little more definite than the advertisement. Instead of running the line *due west*, it says *westwardly*. But *westwardly* would embrace any line between west and north. So that it is not made any more certain, and if it were, it is a departure from the advertisement and cannot be justified by it.

There are equitable considerations also in favor of sustaining the legal objection. It is obvious that the division of the lot by the marshal was an utter destruction of the property. The most valuable frontage of this lot is on New York avenue. The marshal undertook to slice from the whole front on the north, making the front on the side of the lot, which was fatal to the value of the property, and would necessarily cause it to be made at a great sacrifice.

Of course, however, as the complainant comes into

of equity, he must do equity, and inasmuch as it is known *that* Richards bought in good faith, and paid his money for it, *la*id out money in improvements, &c., all that must be *made* good to him.

The decree of the court, then, is, that the decree below is **to be** reversed, the sale set aside, and the case referred to the **audit** or to state an account between Richards and the property, in which Richards shall be credited with the amount of **his** debt and the encumbrances taken up by him, the taxes **paid** by him, the improvements made by him, with interest, and **be** charged with the rents and income derived from the **prop**erty, and the balance ascertained. Then the complainant **will** have the right to pay Richards, or the property may be **sold** for the balance due. That account can be stated under the **d**irection of the Special Term.

GEORGE L. SHERWOOD AND JANE SHERWOOD

vs.

THE DISTRICT OF COLUMBIA.

{ Decided March 10, 1884.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

The District authorities had covered a well located on the public highway and in which was placed a pump for the use of the public, with a wooden platform, and upon this was laid a brick pavement even with the level of the sidewalk. Plaintiff had frequently used the pump, and there was nothing to lead one to suspect any danger or defect about it. On the day in question, while in the act of using the pump, the pavement over the platform suddenly gave way, precipitating plaintiff to the bottom of the well. It was in evidence that the District authorities had not for nine years made any examination or repair of the platform. By the court below it was held that express notice must be brought home to the District of the defect in the covering of the well; but it was—

Held, on appeal, that the District was bound to know that the platform was of perishable material, and to watch over it and keep it in repair; that having left it without examination for nine years, until it became a mass of trap, with the assurance to the public of security, there was such delinquency as rendered the District liable in damages.

THE CASE is stated in the opinion.

JOHN RIDOUT and I. WILLIAMSON for plaintiff.

A. G. RIDDLE and FRANCIS MILLER for the District.

Mr. Chief Justice CARTER delivered the opinion of the court.

The plaintiff and his wife bring this action against the District of Columbia to recover damages for injuries received by the wife by reason of her falling into a public well situated on Seventh street in this city. Plaintiff's right to recover is based upon the alleged negligence of the defendant; while the defendant, on the other hand, claims that it is exempt from liability inasmuch as there is no proof that it had any express notice of the defective condition of the well. This defence was sustained by the court below in an instruction to the jury to find for the defendant. And upon that point, viz., the character of the notice required by the

District before it can be called upon to respond in damages, the case comes here.

The facts are undisputed, and are set forth in a bill of exceptions, which recites as follows:

“ Upon the trial of the above entitled cause, the plaintiffs, to maintain the issue on their part joined, gave evidence tending to show that they were husband and wife, and that on September the 6th, 1881, they resided on the west side of Seventh street, between G and H streets S. W., Washington, D. C., where they had been living about eight months. That early in the morning of September 6, 1881, the plaintiff, George L. Sherwood, left home for the Center Market, where he had a stand for the sale of butter and eggs; and, a little later, about six o'clock a. m., Jane M. Sherwood, needing some water for domestic purposes, took a bucket and went to the nearest pump, which was on the west side of Seventh street, between G and H streets S. W., for the purpose of procuring the same. She had frequently been to this pump, going there every day before the accident for the same purpose, and had no notice of any danger or defect about it; there being no depression of the surface except a few of the bricks around the stock were slightly sunken; that the general surface of the sidewalk was level, and there was nothing to lead one to suspect that the pump was out of repair; that the plaintiff, Jane M. Sherwood, went there, not thinking there was any danger in going there. Having hung her bucket on the spout, and being about to pump, the pavement on which she was standing suddenly gave way beneath her, and she fell through to the bottom of the well, which was some 28 or 30 feet deep. She was entirely immersed in the water at the bottom of the well, and having come to the surface, got hold of a projection in the stock of the pump, to which she clung, until after about twenty minutes her rescue was effected by a colored man, who descended into the well, and arranged a rope around her, by means of which she was drawn up and taken out. She was insensible, and was carried bodily to her house and put to bed. It was some two weeks before she recovered from the

first effects of the shock and the bruises received; and while before the occurrence she was strong and healthy, capable of doing severe work without unusual fatigue, she has since been unable to engage in any domestic duty requiring much exertion without extreme fatigue and prostration. Some time afterwards she began to be troubled with rheumatism — a disease which had not troubled her before. And the plaintiff further gave evidence tending to show that the platform or covering over the well of said pump had been renewed in 1872 or 1873, when Seventh street was improved by the District authorities, and that the platform had not been renewed, repaired or examined from that time to the date of this occurrence, September 6, 1881, and that the portions of the platform which were visible after the occurrence were so decayed as to be mere pulp. And here the plaintiff rested.

Whereupon the defendant, by its counsel, prayed the court to instruct the jury that upon the whole case they should return a verdict for the defendant. And thereupon the court instructed the jury that the plaintiffs were not entitled to recover, because there was no evidence tending to show express notice to the defendant of the defect in the covering of the well, and that there was no evidence that the condition of the footway was such as to charge the defendant with constructive notice of the unsafe condition of the sidewalks. And the court instructed the jury to return a verdict for the defendant. To which ruling, instruction and direction of the court, the plaintiffs, by their counsel, excepted, and prayed the court," &c.

This ruling was maintained by the court below on motion for a new trial, and the sole question presented us the correctness of that ruling as applied to the state of facts embodied in the bill of exceptions.

The doctrine is well settled, that where statutory provisions do not make the corporation a guarantor of the condition of its highways, that the action must be predicated of negligence on the part of the municipality, and to fix upon it the charge of negligence, it must appear that in some way

they were advised of the condition of things which brought about the injury.

The history of this Seventh street well runs through a long series of years, and through repeated changes of the government of the District. It was one among a number of wells dug by the corporation of Washington before the building of the aqueduct, and were located throughout the city with reference to the convenience of the population. The government of the District of Columbia, as distinguished from the corporations of Washington, Georgetown and the county, inherited them. In process of time, improvements were made in the streets of the city, and a wooden platform was placed over this well, and upon that was laid a brick sidewalk. The undisputed facts in the case show that for a period of nine years the District suffered this wooden platform beneath the sidewalk to remain without reformation or renewal, and without investigation as to its condition. And when, at the end of these nine years, this rotten platform gives way, to the damage of this woman, the District comes into court and says, we have had no notice of this condition of things, no notice of the vice that culminated in the fall of this woman, and therefore ought not to be charged with liability. Another government has intervened in the direction of the affairs of the District, and it is owing probably to this change in the personnel of the government that the condition of this well has been overlooked, and not to any personal dereliction on the part of the present officials, nor is it important in the issues of this case to ascertain whether there has been or not. The question is whether we have a corporate delinquency here. Here is a work created by the District, a well dug and excavated in the public highway, with a pump in it, yielding water for domestic purposes. It invites the inhabitants of the neighborhood to go there and get their daily supply. The citizens had no notice of the rotten platform beneath, covered, as it was, by an imperishable brick roof. In using this pump, they had a right to expect that it was devised with a foundation of brick, or material as imperishable. Is the District under

the law chargeable with knowledge of the condition of ~~the~~^{the} structure? They put it there and they covered it up; ~~the~~^{the} dug a hole thirty feet deep below it; they put the brick upon the wood with the knowledge that the latter ~~was~~^{was} perishable. They ought to have known that when they laid these wooden structures upon which the sidewalk was subsequently laid, they were laying something certain to decay. And although bound to know that this platform was liable to decay, the District made no examination of it for nine years! Here was a complete man-trap, with the assurance to the public of security. We hold that the knowledge of these facts was all the notice that was required in this case. Where the city constructs a thing of this kind, it becomes its duty to watch over it, to protect the public, or abide the consequences.

Judgment reversed and new trial granted.

VIRGINIA STEWART vs. JANE SMITH AND LIZZIE CANNON.

EQUITY. No. 7146.

{ Decided March 24, 1884.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. A contract by a married woman for the loan of money to carry on the business of a boarding house in which she is engaged, is not a contract relating to her sole and separate property; but if she has equitably charged her separate estate with the payment of the debt, the creditor's remedy is in equity.
2. Under the Married Woman's Act in force in the District, whatever the character of the separate estate of a married woman, whether legal or equitable, she may make a contract having relation to it.
3. Where a married woman resides in Virginia and owns property to which under the laws of that State her right is sole and separate, she has, when she comes into this jurisdiction, the same capacity, although a non-resident, to sue in respect of such sole and separate right that a married woman in this District has.
4. S., a married woman, conveyed to C., in satisfaction of an indebtedness, a piece of property which largely exceeded in value that indebtedness. S. was, at the time of the conveyance, indebted to another for a loan of money which she had equitably charged upon the property. C. knew, at the time of the conveyance, of the existence of this debt, but it is not shown that she knew of its having been made an equitable charge upon the property. *Held*, that so much of the property conveyed which exceeded in value the indebtedness satisfied thereby, should be subjected to the satisfaction of this equitable charge, and that whether C. knew of the existence of the charge or not was immaterial.

THE CASE is stated in the opinion.

H. O. & R. CLAUGHTON for plaintiff.

JAMES K. REDINGTON for defendant.

Mr. Justice JAMES delivered the opinion of the court.

This is a bill in equity, which recites that in the year 1877 Jane Smith, a married woman, borrowed from the complainant the sum of \$1,000, and at another time during the same year the further sum of \$200; that at the time these sums were loaned, the defendant was engaged in keeping a boarding house, as a sole trader, at certain premises in Washington; that at the same time she was the owner in fee simple and in her separate right, of certain real estate

situated on F street in this city, and that she had charged this real estate with the payment of these two debts; that afterwards she refused to repay the loans, and with intent to defraud the complainant, conveyed this property to her co-defendant, Lizzie Cannon, for a fictitious consideration.

The first point presented for our determination is a murrer which was overruled by the court below. The murrer was interposed on the ground that the complainant should have first recovered a judgment at law against M. Smith, and then filed a bill to set aside this alleged fraudulent conveyance. This defence, it will be seen, assumes that a legal liability for the return of this money has been incurred by the defendant. That is to say, that if it be true, as alleged in the bill, that in October, 1877, Jane Smith was engaged in keeping a boarding house as a trader for her sole and separate use in this city, and that in compliance with her request the plaintiff made these two loans to her for the purpose of providing means for carrying on this boarding house business, then she incurred under the Married Woman's Act, a liability at law. We think, however, it is very clear she did not, and that no action at law would lie in this case. It is not shown, as in cases heretofore decided by us, that anything was procured for the outfit that the defendant already possessed. The facts show simply a loan of money intended for the carrying on of the business of a boarding house. That does not make the contract for a loan of the money a contract relating in any way to her sole and separate property. There was, consequently, no case made out which would support an action at law, and the plaintiff's only remedy would be by showing in a court of equity that the defendant had contracted a debt which had equitably charged upon her separate estate.

We have no doubt that whatever the character of the separate property of a married woman, whether it be legal or equitable, under our statute she may make a contract having relation to it. Our decision does not turn upon the nature of the property, but upon the ground that the defendant is

not shown by this bill to have made any such contract, which, in the contemplation of our statute, relates in any sense to her separate property. On the other hand, it is evident she had made a contract by which, in a court of equity, she may be held as having charged her property with a certain liability.

Another objection made, not on the demurrer, but upon the evidence, is, that it was disclosed by the testimony that the plaintiff, who lives in Virginia, was herself at the time of bringing this action, a married woman, and that she could not sue for the money which she had loaned, but must join with her husband. We were referred to the Virginia statute on that subject. We have examined that statute carefully, and we find that the proviso does not affect the right of action in a case where the married woman had a property which she owned before her marriage. The first clause of that statute distinctly lays down the status of her property, and declares that where she owned the property, as in the case of this plaintiff before her marriage, it remains her sole and separate property, and that she can sue and be sued in respect of it.

It appears, therefore, that the right of this plaintiff as a married woman was sole and separate, and like that of a *feme sole* in Virginia. Her husband had no interest whatever in the matter; and when she comes into this jurisdiction, she has the same capacity, although a non-resident, to sue in respect of such right that a married woman has in this District. There is no difficulty, therefore, in this case as to the plaintiff's personal status.

The only three remaining questions are questions of fact:

1. Whether there was a loan.
2. Whether it was charged upon this property; and
3. Whether this property was conveyed to Lizzie Cannon in fraud of the plaintiff.

There is a conflict of testimony that gave us no little trouble, as to whether this advance of money, which is admitted by the defendants to have been made, was a gift, as the defendant and her husband have sworn, or whether it

was an ordinary loan, intended to be repaid. After comparing the testimony, we have come to the conclusion that we must treat it as a loan. There is such a general presumption against a gift of this sort, that it ought to be very distinctly shown, if such was the case, and this was not done. On the contrary, we could not but observe some shifting of ground, and conflict of testimony, by the defendant, as to the reasons why the plaintiff gave her this money, and with this fact before us, taken with the general presumption, from our knowledge of human nature, that it is more likely that money is loaned than given, we felt compelled to treat this as a loan.

We are also led to the conclusion that there was an assurance given by the defendant equivalent to a charge of the debt upon this property.

The final inquiry is, whether the property was conveyed to Lizzie Cannon in fraud of this debt. It appears by the testimony that a loan had been made by her to Jane Smith for the improvement of this very property, and that the property itself was subsequently conveyed to Lizzie Cannon for \$2,000, the consideration named in the deed. Whether this alleged loan had any existence in point of fact was disputed by the plaintiff. It appears, however, that the defendant Cannon had been serving in government employ here for seventeen or eighteen years. She stated what her compensation had been, and we are satisfied that out of such service and receipts she could very well have saved money enough to make this loan, and that as a matter of fact it was made.

But we find that this same property, yielding a rent of some \$40 a month, must be valued at an amount largely exceeding the consideration stated in the deed. In other words, we find that a very large excess of value seems to have been conveyed to her when this debt of Mrs. Smith was in existence. It was said that she bought it with knowledge of that indebtedness, and also with knowledge that it had been charged upon the property. But we do not find it to be clear that she bought it with knowledge of the charge,

although there seems to be sufficient evidence that she knew that there was a debt.

We find further that this property was conveyed to her for an insufficient consideration. At one time, where a conveyance was made in fraud of creditors, it was set aside entirely, but the courts have modified that doctrine, and now hold that all that is given in plain excess of the satisfaction of the debt, when property is conveyed to a creditor for the payment of a debt, is a voluntary gift. Courts of equity separate the conveyance, so far as it is really in satisfaction of the debt, from the conveyance which is plainly not in satisfaction of the debt, and the latter they consider to be fraudulent and void as against the creditor.

We, therefore, have arrived at the conclusion that the title of Lizzie Cannon may stand good so far as it was in satisfaction of her \$2,000, and that for any excess over that, it was a voluntary gift, to be reached by this creditor who had this charge.

We do not inquire whether she knew of the charge or not, it is enough that the charge existed, whether with or without her knowledge, is unimportant.

We do not allow the defendant Cannon any interest, because she has had possession of this property and has been receiving the rents.

MACKALL vs. MACKALL.

EQUITY. No. 8038.

{ Decided June 23, 1884.

{ Justices WYLIE, COX and JAMES sitting.

In a conveyance between parties holding a confidential relation to each other, the grantee, although not guilty of actual fraud, can take nothing from the deed which it would be inequitable for him, under the circumstances, and in view of that relation, to retain. On the other hand whatever he should equitably retain the court will not disturb. Such a case being distinguishable from one where the deed must be set aside entirely on the ground of fraud.

THE CASE is stated in the opinion.

S. S. HENKLE and R. M. NEWTON for plaintiff.

W. WILLOUGHBY for defendant.

Mr. Justice JAMES delivered the opinion of the court.

In the case of Mackall *et al.* against Mackall the bill set forth that Brooke Mackall, sr., conveyed, two or three weeks before his death, to his son, Brooke Mackall, jr., all of his property in Washington and Georgetown; that this deed was procured from him by acts amounting to actual fraud, by coercion and by undue influences growing out of the confidential relation in which the parties stood. It sets out also a will dated about a month before the execution of the deed by which the grantor, Brooke Mackall, devised to his other children the same property. An enormous amount of testimony was taken for the purpose of showing that the defendant, Brooke Mackall, jr., had his father entirely under his control, and really coerced him, except during a period in which they were estranged from each other a month or two, during which time he made this will.

We have examined this testimony with a great deal of care, and we are not satisfied that *actual fraud* was exercised. It is shown, however, that the defendant, during a considerable period and down to the death of his father, acted as his agent and stood in a confidential relation to him. The rule of equity is that, in a conveyance between parties holding a confidential relation to each other, the

grantee shall take nothing from the deed which it would be inequitable, under the circumstances, for him to retain. Of course, if the deed was secured by fraud we should have to set it aside entirely; but we have come to the conclusion that the only thing demonstrated to us is that a deed was executed between the parties, one of whom stood in a confidential relation to the other, and that if there is anything in that deed which he ought not in view of that relation to retain, he cannot retain it. If, on the other hand, there is anything which it would be equitable for him to retain, we should, to that extent, sustain the deed; such a case being distinguishable from a case in which the whole deed must be treated as a nullity because it was obtained by fraud. In looking, therefore, through the testimony, we find that Brooke Mackall, sr., long before this will was made, gave an equitable title to certain property on the corner of New York avenue and Fourteenth street to his son, Brooke Mackall, jr. Now if, without the exercise upon him of any of the influences of this confidential relation, the grantor gave this property to his son—in other words, if it originated in the will of the grantor himself—the will should not be disturbed. In determining this fact, viz., whether the gift was the voluntary act of Brooke Mackall, sr., we confess it looked at first as if it also had been a transaction under the influence of this confidential relation existing between the grantor and grantee; but we find that in a certain transaction with the government Brooke Mackall, sr., acted in an adverse relation or character to another party. He was not then conducting a transaction with Brooke Mackall, jr., but was acting against the Government, and in that transaction he insisted upon the right of his son, Brooke Mackall, jr., to receive rents from the Government for the use of this particular piece of property, on the ground that it was the property of his son. In other words, we found that he had made this gift on a good consideration, that he had put the grantee in possession, and that the latter expended more or less money on the property after that, perhaps not a very considerable sum, but the facts show sufficient to establish

an equitable title as between himself and his father. When therefore, this deed was afterwards executed, so far as it confirms what was done in the exercise, as we think, of free will and an actual intention, it was a valid deed and must to that extent be allowed to stand.

The decree consequently is that as to the property situated on New York avenue and Fourteenth street this deed is valid, but as to all the rest it is not.

IN RE ROBERT HATCHMAN.

{ Decided February 4, 1884.

{ The CHIEF JUSTICE and Justices MAC ARTHUR and JAMES SITTE

1. In legal effect the action of an applicant or his attorney is the same.
2. Where one of the claims in an original application was rejected upon reference to certain patents, and the applicant, by his attorney, orders same to be erased, and thus obtains and accepts a patent for the residue of his claims, there has been no inadvertence, accident or mistake within the meaning of the patent law, and the patentee is not entitled to a reissue covering the claim before erased.

APPLICATION of Robert Hatchman for reissue of Letters Patent No. 283,602.

Mr. Justice MAC ARTHUR delivered the opinion of the court.

This is an appeal from the decision of the Commissioner of Patents. In his application for a patent, Hatchman made several claims, all of which were allowed except one, and that was rejected on the ground that it was too broad, and was met by previous inventions for which patents had issued. Upon such examination said claim was erased and withdrawn by order of his attorney, and he obtained and accepted the original patent for the other claims, dated August 21, 1883. The application for reissue was made October 5, 1883, for the same claim which had been examined in granting the original patent and rejected, with his acquiescence, or that of his attorney, which is the same thing

in legal effect. Upon this state of the record the reissue was denied, on the ground that the claim had been cancelled by the duly authorized attorney of the applicant, and that, having been cancelled and the patent issued without it, he is not entitled to a reissue covering that identical claim. The case is here on appeal from that decision.

The sole question presented is whether, under these circumstances, Hatchman is entitled to a reissue to protect the disallowed claim on the ground that the same had been rejected by inadvertence, accident and mistake, and without any fraudulent or deceptive intention.

We are of opinion that on an application for a patent, when one of the claims presented is covered by previous inventions and the patents therefor are referred to, and the Examiner upon such reference decides against such claim, and the applicant thereupon, by his attorney, orders the same to be erased and withdrawn, and thus obtains and accepts a patent for the residue of his claims, he is not entitled to a reissued patent containing the identical claim which he has so erased and withdrawn. We also hold that under such circumstances no error has arisen by inadvertence, accident or mistake, within the meaning of the patent law, which would authorize the Commissioner to entertain the application for a reissue. We, therefore, think that the decision appealed from ought to be affirmed, and the appeal is dismissed. Let the proper order be prepared.

LOUISA ULRICH vs. CHARLES ULRICH ET AL.

EQUITY. No. 8005.

{ Decided November 12, 1883.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

Plaintiff filed his bill for divorce and alimony, setting forth that the defendant was the owner of a certain lot in Washington, and alleging that it was all the properties he owned except a small amount of house furniture; and praying that this real estate be subjected to her claim for alimony. Before the filing of the bill the defendant owned two shares of stock in a building association, upon which the association had loaned him \$214, taking therefor a bond which stated the amount loaned to be \$1,000. This bond was secured by a deed of trust upon the real estate in question. After the filing of the bill the defendant repaid this \$214, but subsequently purchased other shares upon which the association made a further loan or advance, under the supposition that the bond and deed of trust first given secured future advances, and that this last loan would be covered by them. Subsequently to this the court passed a decree granting \$25 a month alimony.

Held, 1st. That the recital in the bond that the loan was for \$1,000, was not binding, and that the court could look into the real fact of the case to ascertain what amount was really loaned; 2. That the bond had no reference on its face to any future transaction; 3. That the second loan was entirely independent of the first; 4. That the plaintiff's suit was a *lis pendens*, and charged all persons with notice that the plaintiff was seeking to subject the property described to a decree for alimony; that the defendant having paid the first loan of \$214, discharged the property from the lien of the trust, and that the subsequent loan having been made *pendente lite* was postponed to the lien of the plaintiff for her alimony. But as between the association and the defendant the bond and deed of trust were secured for the subsequent loan.

STATEMENT OF THE CASE.

The original bill in this cause was filed January 19, 1883, and the defendant Ulrich was summoned to answer the following day. The bill was for divorce, the custody of five infant children, and alimony. Paragraph four of the bill averred: "That the defendant is the owner in fee of the lot situate at the northeast corner of 8th and L streets, in square 929, in said city of Washington; that the same is improved, and rents at \$25 per month, and is worth about \$2,500. This property was earned by the joint labor of both the complainant and defendant in the first years of

“their married life.” It further alleged that this was the only property owned by the defendant. The second prayer of the bill was: “That the court may restrain the defendant from selling or incumbering the said real estate until the further order of the court.”

March 20, 1882, the court decreed that defendant pay to plaintiff alimony *pendente lite* at the rate of \$25 per month, and the defendant be restrained from collecting the rents until further order.

June 15, 1882, a final decree was passed dissolving the bond of matrimony, giving the custody of all the children to the plaintiff, and fixing alimony at \$25 per month, and authorizing and empowering the plaintiff to collect the rent of the premises in question, and restraining and enjoining the defendant “from collecting or interfering in any manner with said rents, or in any way disposing of said property until the further order of the court.”

May 12, 1882, a supplemental bill was filed, making the Washington Building and Savings Association No. 4 a party. It averred that defendant Ulrich, on the 29th day of August, 1879, made his bond to the treasurer of said association in the sum of \$1,000, and on the same day the defendant, Ulrich, and the plaintiff, his wife, executed an ordinary deed of trust, upon the property in question, to secure the performance of the conditions of the bond.

The bond was as follows:

“ Washington Building and Savings Association No. 4.

“ Know all men by these presents, that I, Chas. Otto Ulrich, of the city of Washington, in the District of Columbia, am held and firmly bound unto Lorenz Kissner, treasurer of the Washington Building and Savings Association No. 4, of the city of Washington, in the just and full sum of one thousand dollars, current money of the United States, to be paid unto the said Lorenz Kissner, treasurer as aforesaid, or to his successor in office, for which payment, well and truly to be made in the manner following, I bind myself, my heirs, executors and administrators. Sealed with

my seal, and dated this twenty-ninth day of August, 1882, and thousand eight hundred and seventy-nine.

"Whereas, the said Chas. Otto Ulrich, a stockholder to the extent of five shares in the said association, in virtue of and in accordance with the provisions of the constitution of the said association, and the obligation thereto, received from the said association the sum of two thousand dollars.

"Now, if the said Chas. Otto Ulrich, or his heirs, executors or administrators, shall well and truly pay or be paid unto the said Lorenz Kissner, treasurer of the said association, or to his successor in office, the sum of two dollars for each of his shares of stock held by him, on which has been advanced to him, monthly and every month commencing from the date hereof, and continue to pay the same on the second Monday of each and every month thereafter, and also all fines and forfeitures which may be levied upon or incurred by the said Chas. Otto Ulrich by virtue of the provisions of the said constitution, until the close of the said association, or return of the money advanced to him, then this obligation to be void, or else to remain in full force and virtue in law.

"C. OTTO ULRICH.

The supplemental bill further averred that the debt secured by the above bond was paid off, with the exception of two thousand dollars at the time of the filing of the original bill, and that on January 19, 1882, and that the purposes for which the bond and deed of trust were given, had been executed; and that after the filing of the original bill, the association advised the plaintiff to Ulrich about the sum of \$750, and was seeking to recover the property responsible therefor under the bond and deed of trust. The supplemental bill concluded with prayer for an accounting and settlement, and for discovery, injunction, and other relief. The association answered through its secretaries and treasurer. Whereupon, on November 20, 1882, the court was, by order of the court, referred to the auditor to examine the evidence, and report: First. "The amount of

debtedness, if any, that was due from defendant Charles Otto Ulrich to the defendant building association at the time the original bill was filed, and secured by the deed of trust, mentioned in the supplemental bill, upon the real estate described in these proceedings." Secondly. "The amount the said building association advanced to defendant Charles Otto Ulrich after the filing of said original bill, and whether the same is secured by the said deed of trust as a lien upon said real estate." And, thirdly, "The amount of the debt due the said defendant building association by defendant Charles Otto Ulrich, and secured by the said deed of trust as a lien upon the said real estate described in the supplemental bill."

The auditor filed his report to the effect that there was due at the date of filing the original bill \$55.36; that the amount advanced to Charles Otto Ulrich after the filing of the original bill was \$556; and that the balance due at date of report was \$447.90, which he reported as a lien on the property, secured by the bond and mortgage mentioned.

A verified transcript of the accounts, furnished by the secretary and filed in the cause, showed that on August 29, 1879, the association advanced to Ulrich on the bond \$214. That this amount was reduced by sundry payments, until March 21, 1882, when Ulrich paid \$160, which exceeded the amount found due by the auditor by \$104.64, but on March 23, 1882, the association advanced \$556, thereby bringing Ulrich again into its debt in the sum of \$441.36, which, by the accumulation of interest, became \$447.90.

January 6, 1883, the complainant filed the following exceptions to the auditor's report. (1.) That the auditor erred in holding that the deed of trust was a security for future advances. (2.) The auditor erred in not reporting the extinguishment of the debt due at that time by defendant Ulrich to the association, by the payment of \$160, mentioned in Schedule "C," the same having been made March 21, 1882, as appears from the transcript filed in this cause of the accounts between defendant Ulrich and the association, at which time Ulrich was indebted to the association in the sum of \$51.90, as per

Schedule "C." The said payment of \$160 not only paid ~~a~~ll the indebtedness then due under the bond and deed of trust, but brought the association in their accounts, indebted ~~to~~ defendant Ulrich in the sum of \$108.10. By reason of ~~th~~is is the auditor erred in not finding the deed of trust *functus ~~offi-~~*cio, the debt thereunder being fully paid. (3.) The audi~~tor~~ erred in treating the new loan of \$556, made March ~~2~~3, 1882, two days after the payment of the \$160 mention~~ed~~, and the consequent extinguishment of all indebtedness ~~on~~ the part of Ulrich to the association, that was then ~~due~~ under the bond, and secured by the deed of trust, as a ~~con-~~tinuance of the original loan of \$214. Although the ~~bon~~d recites an indebtedness of \$1,000, the actual indebtedn~~e~~ss was \$214, and although the bond recites that Ulrich was ~~th~~e owner of five shares of stock, he was the actual owner ~~of~~ but two shares, and this indebtedness having been fully ~~e~~xtinguished by the payment of the said sum of \$160, March 21, 1882, the bond or obligation, by its very terms, beca~~me~~ void; and, (4.) The auditor erred in holding the original bill not to be *lis pendens*, and in further holding that ~~th~~e supposed lien the association may have on said real esta~~te~~, by the deed of trust to secure money advanced to Ulr~~i~~ch after the filing of the original bill, can be asserted ~~th~~e~~r~~eunder so as to disturb the final decree of the court pas~~sed~~ June 15, 1882.

The indebtedness now due to the association is for mor~~ney~~ wholly advanced to Ulrich after the filing of the origi~~nal~~ bill, and the security given upon the real estate is subor~~d~~inate to the final decree of the court, which gives to ~~th~~e plaintiff the rents and income thereof, and restrains the ~~d~~e-fendant Ulrich from encumbering, &c., the same.

Upon the hearing, these exceptions were overruled, ~~and~~ the supplemental bill dismissed with costs, by decre~~e~~ of April 9, 1882, from which the plaintiff appealed.

J. G. BIGELOW for plaintiff.

Does the deed of trust in question purport to secure fut~~u~~re advances? The answer is, that it does not. The deed ~~of~~

trust is given to secure the faithful performance of the conditions of the bond, and contains the provision that in case of default in that respect, the trustees shall have the power to sell, &c. The right to sell under the deed of trust depends exclusively upon a breach of the conditions of the bond. The condition of the bond is that in case Ulrich shall pay two dollars on each share of the stock held by him, *on which money has been advanced*, per month, until the close of the association, or until he has repaid the money advanced to him, the bond is to be void. There is no provision in the bond or deed of trust, obligating the association to advance any future sum or sums to Ulrich. Nor is there any provision therein that the bond may be deemed to cover any future sums the association may advance.

The deed of trust and bond do not contain a single requisite to make them security for future advances. Jones on Mortgages, sections 365, 367.

If the condition of the bond required Ulrich to pay two dollars monthly on each share of stock owned by him, and on which money has been advanced, or that he shall hereafter own, and on which money shall be hereafter advanced, then the bond would fulfil the requirements of section 367, Jones on Mortgages, and advances to the extent of \$1,000 could have been made by the association under the deed of trust.

The second question is: Was the original debt paid off before the second advance of \$556? The record shows that it was. The original loan was on two shares of stock (all that Ulrich then owned) of \$214, made August 29, 1879. This indebtedness was reduced by sundry payments to \$51.90, as per Schedule "C," Auditor's Report, when, on March 21, 1882, Ulrich paid to the association \$160. This payment not only extinguished all indebtedness under the bond and deed of trust, but actually brought the association in debt to Ulrich in the sum of \$108. Now, the condition of the bond is, that in case of a "return of the money advanced to him," on the shares of stock held by him," then this obligation to be void. "There can be no controversy

about the fact of the return, by Ulrich, of all the money advanced to him by the association under this bond and deed of trust, on March 21, 1882. The bond thereby became void, and the deed of trust *functus officio*.

The third question is: "Can this bond and deed of trust be revived as against the plaintiff by the act of defendant Ulrich, and the building association, whereby, on March 21, 1882, two days thereafter, the association advanced to Ulrich the sum of \$556? Barring the item of interest (which makes apparent discrepancies in small sums), this advance brought Ulrich again into debt to the association \$556 - \$108.10 = \$447.90, which the auditor finds due and secured by the deed of trust and bond. There is no theory upon which this finding can be maintained, except of redelivery of these instruments.

The original debt had all been paid, and the bond by its very terms had become void, and the deed of trust *functus officio*. The only way in which they can again acquire validity is upon the theory they were redelivered by the husband, and pledged for security for this new loan, or the balance of it after deducting the indebtedness of the association to Ulrich. Under the circumstances of this case and considering the situation of the parties, no one can seriously maintain this could be done so as to disturb the final decree allowing alimony to the plaintiff out of the real estate in question. 2 Jones on Mortgages, sections 947 and 9

The only remaining question is: Was the original bill *lis pendens*? The original bill was filed January 19, 1882, and subpœna to answer was served on the following day. It was for divorce a *vinculo matrimonii*, the custody of the five infant children, and alimony. We have only to consider it here as a suit for alimony, and to inquire whether the doctrine of *lis pendens* applies to this particular case.

No principle of the law is recognized in a greater multitude of cases than the rule of *lis pendens*. The reasons are given by Justice Story. 1 Story, sections 405 and 4

The *lis pendens* begins with serving of the subpœna. Jones on Mortgages, section 1411.

The doctrine of *lis pendens* is elaborately considered by Chancellor Kent in *Murray vs. Ballou*, 1 John. Ch., 566.

But no one denies the doctrine or principle of *lis pendens* generally. The question is: Does it apply to this suit for alimony? It was conceded by plaintiff's counsel in the court below, and it is conceded here, that *lis pendens* does not apply generally to suits for alimony; that is, it does not apply to such suits where the plaintiff seeks to have the estate generally of the defendant subjected to the claim for alimony. There could be no reason for the application of the doctrine of *lis pendens* in such a suit for alimony. But designedly the plaintiff's suit is distinguished from the ordinary suit for alimony, in this, that she seeks by her bill to subject this particular piece of property to her claim for alimony. No one can read the bill and mistake its object in this respect. The property is described with sufficient certainty to acquaint any one of its location and character. It is averred in the bill that it is the only property the defendant owns, out of which alimony can be paid. In the prayers it is prayed that the defendant be restrained and enjoined from encumbering, selling or conveying away the described property. The plaintiff prosecuted her suit diligently, and as soon as the rules of the court would permit, obtained, on March 30, 1882, the restraining order as prayed.

It was argued in the court below that these averments in the bill, and this prayer, distinguished this case from ordinary suits for alimony, in which the property generally of the defendant is sought to be subjected to the claim, and brought it under the application of the doctrine and principle of *lis pendens*, but no authority could be cited in support of the position. This precise question, however, has recently been before, and determined by the Supreme Court of North Carolina, in the case of *Daniel vs. Hodges*, 15 Reporter, 534. Justice Ashe delivered the following opinion: "The defendant contends that the conveyances from her husband, Joseph Hodges, to W. W. Hall, and from Hall to the plaintiff, having been made while her action for alimony was pending, and especially after the order of the Superior

Court, assigning her the lot in question, were brought within the principles involved in the law of *lis pendens*.

"The rule of *lis pendens* is a principle founded, not much upon the doctrine of notice, as in the motives of public policy. Hence, it is held as a general principle, that every one is presumed to be attentive to what passes in the courts of justice in the State where he resides, and that he who purchases during the pendency of a suit, the property in litigation therein, is bound by the decree or judgment that may be rendered against a party to that action from whom he derives title; and this, whether he purchased for a valuable consideration and without any express or implied notice in point of fact. (1 Story on Eq. Jur., §§ 405, 406.) But in order to give effect to these principles, two things are said to be indispensable. First: That the litigation should be about some specific thing which must be necessarily affected by the termination of the suit; and secondly, that the specific property must be so pointed out by the proceedings as to warn the whole world that they meddle with it at their peril. Freeman on Judgments, 196; Greene v. Slayter, 4 John. Ch., 38.

"Under the application of these principles it has been held, by an almost invariable uniformity in the decisions upon the subject, that the rule of *lis pendens* does not apply to proceedings for alimony, for the reason that such a suit is in *personam*, and does not apply to any specific part of the personal or real estate of the husband. The judgment obtained in such a proceeding, says Judge Story, constitutes a lien upon the defendant's property from the time of the docketing, but does not constitute a *lis pendens* any more than any other sufficient cause for action. 1 Story on Eq. Jur., § 196.

"In *Almond vs. Almond*, 4 Rand., 662, the same doctrine is announced. It is there held that the claim of the wife for alimony is a personal claim on the husband, and that she has no lien on any specific property without an agreement; and to the same effect is *Brightman vs. Brightman*, 1 R. J., 112. It must be admitted that these decisions are

supported by sound reason and good policy, for as the prayer of the petition for alimony, according to the formula, is to have such reasonable subsistence secured to her out of the estate of her husband as may be deemed just and proper by the court, the application of the rule of *lis pendens*, in such a case, would lock up the entire estate of the defendant, for the alimony would attach to every part of the real and personal property the husband had at the time of filing the petition. Such, we understand, is the generally received doctrine in regard to the exclusion of the application of *lis pendens* in proceedings for alimony.

"But the particular circumstances of the case before us, in our opinion, constitute an exceptional case. While the prayer of the petition for alimony is in the usual form, it is stated in the petition that the lot in question was the only property in the State owned by the husband, and was the only property out of which alimony could be granted, and it was specifically described with such particularity that every person reading the petition could learn thereby what property it was she sought to have made subservient to her claim. And, although the prayer of her petition was in the usual general form, it was as evident that she was seeking to subject the lot in question to her claim for alimony, as if she had specially prayed that it might be assigned to her."

It will be readily seen that this case meets all the necessities of the one under consideration with respect to the question of the application of the rule of *lis pendens*. Indeed, so far as the question of the application of this rule is concerned, the facts and circumstances of the two cases are strikingly alike. The very identical grounds on which Justice Ashe holds the rule of *lis pendens* applicable to this North Carolina case, exist in the present case in their entirety.

It is submitted that the law as laid down by the Supreme Court of North Carolina is sound, and is conclusive of the case under consideration.

JOHN E. NORRIS and CHAS. A. WALTER for defendants.

Mr. Justice JAMES delivered the opinion of the court.

On the 29th day of August, 1879, the defendant Charles Ulrich took steps for effecting a loan from the Washington Building Association. The papers were in the usual form, that is to say, embraced a bond which was secured by a deed of trust. The bond was in the following words:

“Washington Building and Savings Association No. 4.

“Know all men by these presents, that I, Chas. Otto Ulrich, of the city of Washington, in the District of Columbia, am held and firmly bound unto Lorenz Kissner, treasurer of the Washington Building and Savings Association No 4, of the city of Washington, in the just and full sum of one thousand dollars, current money of the United States, to be paid unto the said Lorenz Kissner, treasurer as aforesaid, or to his successor in office, for which payment, well and truly to be made in the manner following, I bind myself, my heirs, executors and administrators. Sealed with my seal, and dated this twenty-ninth day of August, one thousand eight hundred and seventy-nine.

“Whereas, the said Chas. Otto Ulrich, a stockholder to the extent of five shares in the said association, has, by virtue of and in accordance with the provisions of the constitution of the said association, and the obligation attached thereto, received from the said association the sum of one thousand dollars.

“Now, if the said Chas. Otto Ulrich, or his heirs, executors or administrators, shall well and truly pay or cause to be paid unto the said Lorenz Kissner, treasurer as aforesaid, or to his successor in office, the sum of two dollars on each of his shares of stock held by him, on which money has been advanced to him, monthly and every month, commencing from the date hereof, and continue to pay the same on the second Monday of each and every month thereafter, and also all fines and forfeitures which may be imposed upon or incurred by the said Chas. Otto Ulrich by virtue of the provisions of the said constitution, until the close of the said association, or return of the money advanced to him,

then this obligation to be void, or else to remain in full force and virtue in law.



"C. OTTO ULRICH."

The condition of this bond, which, as has been stated, was secured by a deed of trust, was to pay two dollars a month on each share of stock held by Ulrich. Afterwards, on the 19th of January, 1882, the plaintiff, Louisa Ulrich, filed her petition for divorce, setting forth that the defendant, Charles Ulrich, was the owner of a certain lot in Washington, and alleging that it was all the property he owned, except a small amount of household furniture, and asking, first, a divorce and then alimony, praying meantime for alimony *pendente lite*.

It appears that before the filing of the bill the building association had, as a matter of fact, loaned to Charles Ulrich not \$214, but \$1,000, and that he was, as a matter of fact, the owner of two shares, not of five, and that the \$214 were loaned upon these two shares. After the filing of the petition for divorce and for alimony, setting forth that this was the only real estate that the defendant possessed, Ulrich purchased other shares, having first surrendered one of his two, and then he afterwards purchased four other shares, and upon these shares the association made another advance to him.

The questions are, first, whether the lending of the \$214 on the two shares and the subsequent advances on the four shares were one transaction, and intended to be so by the instruments executed. And, next, if they were separate and independent transactions, whether the petition for divorce and alimony setting forth that this was the only property which the defendant owned, was such a *lis pendens* as to charge all persons purchasing this real estate, or loaning money upon it, with notice that the complainant was seeking to subject it to her alimony.

We are of opinion that the two transactions were entirely independent. By the constitution of this association all loans were made upon the stock and secured by real

estate. The repayment of the loan was regulated by the amount of stock which the stockholder owned. If this repayment was to be accomplished in the manner usual with these associations, namely, by the payment of so much each month upon the stock, then the measure of payment was ascertained and the fact established that the loan had distinct relation to the stock that the party owned at the time. So this first loan of \$214, payable by paying monthly two dollars on each of two shares of stock, had distinct reference to the two shares which Ulrich owned. He did not, at that time, have more than these two shares. So that if he should wish to borrow more money he would have to acquire other shares, thus making any further loan, a loan made in respect of those shares yet to be acquired.

It was claimed, however, that this bond was prospective; that whatever loans the association might yet make were to be covered by it. There is no doubt that the bonds given to these building associations are usually framed in that way, but this bond is not. It sets forth an existing debt, but misstates the amount, so that on the face of the bond it would appear as if Ulrich had received the thousand dollars. The recitals in these bonds, however, are not binding. We can look into the real facts of the case, as we have done, and we find that Ulrich had not received any such sum, and that the bond has no reference on its face to any future transaction.

If, then, this petition for the allowance of alimony can be treated as a suit relating to this property, it would follow that the building association had no right to enter into new and independent transactions, and make a new loan upon the security of it in disregard of the pending suit brought to subject that property to the payment of alimony. It is claimed that a suit for alimony, although it described this property, was only a suit *in personam*. If it were so, of course the doctrine of *lis pendens* would be inapplicable.

The case of *Daniel vs. Hodges*, 15 Reporter, 534, decided by the Supreme Court of North Carolina, was a decision upon a similar question. In that case the petitioner set forth that

the property described was the only property that the defendant possessed, and the court held that it was necessarily a suit to subject that property to her alimony, and might be pleaded as *lis pendens*, so that any transactions by strangers relating to that property were made with full notice of the suit pending in relation to it, and must be postponed to the rights acquired thereunder.

We have carefully considered this North Carolina case, because we understand it to have been the only one in point which counsel were able to find, and we are of opinion that the reasons applicable to that case as a *lis pendens* apply here fully. The complainant's suit, besides being a suit for divorce, was a suit to subject this very property to her alimony. It could not have referred to any other property, because she stated that this was all the property the defendant had. We must, therefore, regard this suit as *lis pendens* in respect of this property.

The case then is, that after \$214 had been loaned to the defendant Ulrich upon this property, the complainant brought a suit for divorce and alimony, and prayed that his property should be subjected to that claim. With notice of that suit, the building association proceeded to lend Ulrich more money, upon the security of the property. Two days before the new loan was made, the association received from Ulrich \$160, while there was due to it only \$52 and some cents of the original loan. So that before the association made the new loan, the old one had been extinguished, and an over payment of \$108 made.

So far, therefore, as the complainant was concerned, this bond which gave a prior lien for an existing debt, and only for an existing debt, had performed its function, and any decree that might afterwards be made, allowing her alimony, would give her a first lien upon the property. There was such a decree fixing her alimony at \$25 a month. The bond and the deed of trust no longer interposed any lien ahead of her. So that so far as she was concerned (but only so far as she was concerned), they were satisfied.

But as between Ulrich and the building association, we

are of opinion that although the thousand dollars had ^{no} yet been advanced, but only \$214 of it, yet if it was ^{under-}stood that the \$214 was a part of the thousand dollars ^{loan,} and Ulrich accepted it as a part, the whole loan would ^{stand} secured by this bond and the deed of trust, so far as he ^{was} competent to make it, and continued to support a lien ^{on} this property as against him. The result is that the ^{com-}plainant has a prior lien for her alimony, and after ^{that} comes the lien of the building association. The alimony is itself subject to the control of the court, to be reduced ^{and} possibly increased. Her lien, therefore, is for her alimony—not for \$25 a month—but for her alimony, which is ^{now} \$25 a month, and the lien of the association on this ^{prop-}erty for their loan, is postponed to this claim.

The decree of the court below is reversed, and counsel will prepare a decree in accordance with this opinion.*

*ULRICH vs. ULRICH.—The following was the decree of the General Term in this case in accordance with the above opinion;

This cause came on to be heard on the record and proofs, in the General Term, on plaintiff's appeal from decree of the Special Term, and was ^{argued} by counsel. Whereupon, upon due consideration thereof, it is this 15th day of November, A. D. 1883, adjudged, ordered and decreed as follows:

1st. That the decree of the Special Term of April 9, 1883, affirming the auditor's report and dismissing the supplemental bill with costs, be and the same is hereby reversed.

2d. That the bond and deed of trust dated August 29, 1879, mentioned and set forth in the supplemental bill, do not constitute security for future advances; and the original indebtedness of \$214 thereunder of defendant Ulrich to the Building Association was fully paid and discharged as to the plaintiff March 21, 1882.

3d. That the original bill for divorce and alimony filed January 19, 1882, was a *lis pendens* with reference to the particular piece of real estate described in the pleadings, and the final decree of the Special Term of June 15, 1882, subjecting the same to plaintiff's claim for alimony, constitutes a lien ^{there-}on in behalf of the plaintiff paramount to the claim, under said bond ^{and} deed of trust, of the building association for money advanced to Ulrich, March 22, 1882, after said bill was filed and service of subpoena. And the provisions of said final decree of June 15, 1882, are hereby continued in ^{force} until the further order of the court.

4th. That defendant, The Washington Building and Savings Association No. 4 be and the same hereby is restrained and enjoined from selling or attempting to sell the said described real estate and premises, under the said bond and deed of trust until the further order of the court.

And it is further ordered, adjudged and decreed that the costs to be ^{taxed} by the clerk, arising out of the supplemental bill, be and the same here-^{by} are adjudged against defendants, Charles Otto Ulrich and the said Build-^{ing} and Savings Association, and that the plaintiff have execution thereof.

GEORGE F. RIDER ET AL. vs. CHARLES WHITE ET AL.

EQUITY. No. 4152.

{ Decided October 27, 1884.

{ Justices MAC ARTHUR, HAGNER and JAMES sitting.

A court of equity will not allow a debtor who has conveyed his property with intent to defraud his creditors, to impugn his deed, or aid him to extricate himself from the embarrassment created by his own wrong.

An executor, being a party to a suit, is an incompetent witness to invalidate a contract made by him personally with his decedent, and which is the subject of the suit.

A claim which has been suffered to sleep for nearly twenty years, with no effort to enforce it, will not be sustained by a court of equity when, in addition to suspicious circumstances surrounding it, there is no evidence going to satisfactorily explain the delay.

THE CASE is stated in the opinion.

FRANCIS MILLER for plaintiffs.

HINE & THOMAS for defendants.

Mr. Justice HAGNER delivered the opinion of the court.

This bill was filed by George F. Rider, claiming in his own right and as administrator of Lucy Rider, his mother, in February, 1875, against Charles White and his wife, and Pearson, who was sued as trustee.

It alleged that on the 4th of September, 1854, White and his wife executed a conveyance to Pearson, as trustee, to secure the payment of seventeen notes which had been given by White, payable to the order of Rider; and also of a balance of one thousand and ninety-three dollars and seventy-seven cents, due by Rider to Mrs. Lucy Rider, his mother, on a promissory note which he had previously executed to her; that default had been made in the payment of several of the individual notes which were enumerated, and particularly that this balance of one thousand and ninety-three dollars and seventy-seven cents was still unpaid to Mrs. Lucy Rider; and it prayed that an account should be taken of these different demands, and that there should be foreclosure of the deed of trust.

There were two amendments of the bill; the last in 1879,

after a large mass of testimony had been taken. It appears from the evidence that on the 30th of April, 1851, Mrs. Rider lent her son, the complainant, \$2,052.16, for which she received his note, payable three years after date, and secured by mortgage from George F. Rider to his mother of two lots of land, numbered twenty and twenty-one, in square D, South Washington, then occupied as an iron foundry by George F. Rider and Charles White, who were brothers-in-law. In 1854 the partners agreed to dissolve their business relations, and Rider sold out to White his interest in the foundry and these lots, for a large sum of money. The seventeen promissory notes were given to secure the payment of part of the purchase money, and, as a further consideration, White assumed the payment of this one thousand and ninety-three dollars and seventy-seven cents to Mrs. Rider, and to secure all this indebtedness, White executed this deed of trust to Pearson of the lots which had been previously conveyed to him by Rider.

The first defence set up by White was that he owed nothing whatever on the seventeen individual notes given on account of the purchase; and among other evidences of this, he alleged that in 1865 the question of this indebtedness had been submitted to the arbitration of Messrs. Mattingly and Wood, with power to call in a third person; that Mr. Bradley had been called in as umpire; and the result of that investigation disclosed, that so far from White being in debt to Rider, the reverse was found to be the case that thereupon Rider undertook to revoke the authority of Mattingly, the referee selected by him; but the remaining referee returned as his judgment, that the indebtedness of Rider to White amounted to several thousand dollars. This part of the claim, after all the proof came in, was abandoned by the complainant Rider, and the only question contested in the court below, and now before us, relates to the responsibility of White on the Lucy Rider note.

With respect to this claim, the defence interposed that White was, that he had been entirely exonerated from the payment in 1855 under what he called a "family arrang-

ment" between himself and his brother-in-law. White insisted that Mrs. Lucy Rider, as executrix of her husband, the father of Mrs. White, was chargeable with considerable sums, and had paid nothing to her daughter, Mrs. White, on account of her distributive share; and that George F. Rider, who had received all the moneys of the estate, as agent of his mother, was really accountable for the payment of Mrs. White's share, and for that reason he agreed to reassume the payment of the balance of the note and release White from all further responsibility on account of that debt. And he further insisted that, after Rider had again, by that arrangement, assumed the payment of this balance, the debt itself had been paid by Rider, and was wholly released and extinguished. He, also, as a further defence, relied upon the staleness of the claim.

A large amount of testimony was taken, which we have gone through with the greater care, for the reason that the sum involved is below the amount necessary to justify an appeal elsewhere.

We find in proof, laying aside all questions as to the individual notes, that, after White had, in September, 1854, agreed to pay this balance; the complainant, George F. Rider, on the 13th of February, 1855, executed a deed of trust on another portion of his own property (lot 15, square 465), to Hamilton, as trustee, to secure the payment of this note to his mother. Afterwards, Mrs. Rider died, and by her will George F. Rider was made one of the two executors, and he was the only one who qualified. In 1866, a conveyance was executed by Hamilton, the trustee, in which Rider joined, as executor of Mrs. Rider, releasing this deed of trust from George F. Rider to Hamilton. And White insisted that not only was this balance discharged as to him under this family arrangement, by which he was released from further responsibility, and George F. Rider reassumed its payment, but, according to George F. Rider's own declaration, made in the deed of release, the deed of trust to Hamilton, by which he promised anew to pay it, was discharged."

The reply to this, made by Rider, is two-fold. First, he positively denied that there was any such family arrangement. He further insisted that, although he did, in 1855, execute a conveyance by which he apparently reassumed the responsibility for the debt, yet that this was merely done by him to prevent, hinder and delay a man named Morsell, who claimed to be his creditor, from recovering money which he did not believe he justly owed; and that the subsequent release, executed by him as executor, was made on the same consideration, and as part of the same device.

Such a defence, as a matter of course, is not to be tolerated by a court of equity. It would be a new departure, indeed, if the judges of a court of conscience were to consent to uphold the hands of a debtor who, in order to cheat his creditors, had covered up his property; and who after this part of his scheme of fraud has proved successful, finds himself embarrassed by the existence of his fraudulent deed, and asks the court to extricate him from the consequences of his wrongful act. If such a man should file a bill asking to have the deed set aside, the court would leave him to lie in the bed he had made for himself, and would refuse its aid. We do so here. Such a defence cannot be allowed to impugn his own deliberate formal act.

Again, we think the objection is well taken, that Rider himself is not a competent witness to invalidate the contract under seal made by him with his decedent, by which he bound himself to pay her this debt. Mrs. Rider is dead, and the surviving party to that contract cannot be heard to impugn it. Especially should this be so where, as in this case, the executor is a party, and is testifying in his own behalf, and on his own offer, to get clear of a claim against himself personally. And if Rider's testimony upon this point be rejected, there remains no evidence to sustain his contention in the case.

To show that White never supposed that he was discharged by the execution of the deed to Hamilton, Rider asserts that after he had executed the deed to Hamilton, namely, on the 2d of March, 1855, White paid two hundred dollars on the

Lucy Rider note; and he produced the note in court, on **which** is written: "March 2, 1855. Received on the within **note \$200.**" This endorsement is not signed, but it is admitted by White to be in his handwriting. The previous endorsement of a payment is signed by Mrs. Rider herself, and tested by a witness.

He further averred that at the time this payment was made, or shortly afterwards, a letter was written for Mr. White, by his clerk, and signed by the clerk in his behalf, to Mrs. Rider, stating that he enclosed two hundred dollars on account of this note. That letter is also produced in the handwriting of the clerk.

If the only evidence of this assertion were the testimony of Rider, offered in his own behalf, the assertion would be dismissed without further notice. But White admits that he believes the endorsement on the note is in his own handwriting, and that the letter is in the handwriting of the clerk. White testifies, in reply, that on the 2d of March, 1855, he did pay Rider two hundred dollars, but that he did not pay it on account of this note, and Rider did not ask it on that account; that he owed Rider money on account of the purchase, at that time, and Rider came to him and told him he wanted to send money to his mother as interest on this note, and he accordingly gave him a check for the \$200; that Rider then asked him to write the memorandum on the note, and he wrote it accordingly, but with no purpose or thought of reassuming any responsibility for the note. That as to this letter, written by the clerk, who was also Rider's clerk, and is now dead, he never saw it until it was produced before the examiner; that the clerk had no authority to write it for him, and he denounced the whole affair as a trumped-up scheme to defraud.

A fact, in apparent confirmation of White's statement, is, that in the original bill filed in 1875, by George F. Rider, the complainant stated, under oath, that the whole of this balance of one thousand and ninety-three dollars and seventy-seven cents, with interest, is then due. The payment of this two hundred dollars was not then spoken of; for that

credit, if then admitted, would have reduced the debt from one thousand and ninety-three dollars and seventy-seven cents to eight hundred and odd dollars. But it was not until four years afterwards, when the last amended bill was filed, that we first hear one word said about this payment.

Lastly, Dulin, who, Rider asserted, witnessed the payment of the \$200, was called as a witness by White (Rider having failed to call him), and he testified that he remembered nothing of any such payment, and that he never was in the house where Rider asserted the payment was made.

Upon the whole, we conclude that the evidence fails to support at all the idea that this two hundred dollars was paid on this note; and, therefore, we conclude that the defence set up by White is sustained; that this defendant was absolved from further liability by the family arrangement, and the whole responsibility for the note was then assumed by the deed of George F. Rider, and that he afterwards released it on the record. When he comes in himself, as an executor to claim this money, and is confronted by his release, under seal, recorded and giving notice to the whole world, he must get some other evidence than his own testimony to sustain his claim.

Further, it appears that Lucy Rider bequeathed this particular note to a son of George F. Rider, namely, George N. Rider, by a codicil to her will, and therein she describes the note, particularly, as being secured by a deed of trust executed by George F. Rider, February 13, 1855, to Hamilton, and gives the folio and liber in which the deed of trust is recorded. When Rider is asked, on cross-examination, how that information was communicated to his mother, he admits that he sent it to her, with a view to its insertion in her will.

There is another defence, however, which would be perfectly satisfactory to us, if it stood alone, and which, when taken in connection with the state of the proof, is conclusive; and that is the staleness of the claim. This bill was filed on the 8th of February, 1875. The original note and mortgage were given April 30, 1851, by George F. Rider to his mother. The note was to be paid in three years, and, there-

fore, became due on the 30th of April, 1854, which was twenty years and ten months before the filing of the bill. On the following September 4, 1854, White and his wife executed the deed of trust to Pearson, which it is attempted to foreclose in these proceedings. Now, that was twenty years and five months before the filing of this bill. Suppose, however, that the \$200 was actually paid on this note by White on the 2d of March, 1855. Then that date is nineteen years and eleven months and six days before the filing of the bill—about twenty-two days less than twenty years. Although the Statute of Limitations is not formally pleaded, the defence of laches and staleness is urged to the enforcement of this claim. The law on the subject is very well expounded by the writers, and I cannot find a better statement of it than this, which I read from Story's Equity, sec. 1520:

“The statutes of limitations, where they are addressed to courts of equity, as well as to courts of law, as they seem to be in all cases of concurrent jurisdiction at law and in equity (as, for example, in the matters of account), to which they directly apply, seem equally obligatory in each court. It has been very justly observed that in such cases courts of equity do not act so much *in analogy* to the statutes as *in obedience* to them. In a great variety of other cases, courts of equity act upon the analogy of the limitations at law. Thus, for example, if a legal title would, in ejectment, be barred by twenty years' adverse possession, courts of equity will act upon the like limitation, and apply it to all cases of relief sought upon equitable titles or claims touching real estate. Thus, for example, if the mortgagee has been in possession of the mortgaged estate for twenty years, without acknowledging the existence of the mortgage, it will be presumed that the mortgage is foreclosed, and that he holds by an absolute title. If the mortgagor has been in possession of the mortgaged estate for the like space of time, without acknowledging the mortgage debt, it will be presumed to be paid. If the judgment creditor has lain by for twenty years without any effort to enforce his judgment,

and it has not been acknowledged by the debtor within **that** time, it will be presumed to be satisfied. And in all **these** cases courts of equity will act upon these facts as a **positive** bar to relief in equity. But a defence, peculiar to courts of equity, is that founded upon the mere lapse of time, and **the** staleness of the claim, in cases where no statute of **limi**tations directly governs the case. In such cases, courts of equity act sometimes by analogy to the law, and sometimes act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to **in**terfere, where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the **asser**tion of adverse rights."

The author describes precisely this case. The mortgagor was in possession of this property for a very long **period** without any acknowledgment by him of the debt. If **we** discredit the payment of the two hundred dollars on **the** note, there had been no recognition on his part of the **debt** for twenty years and five months before this bill was **filed**. Supposing, however, that payment to be established by **the**, proof (which we have shown is not the case) then he was in possession nineteen years six months and eleven days from that time without such acknowledgment before this bill **was** filed. These men were not strangers, living far apart **all** these years—they were living side by side; they were brothers-in-law. Nor can this silence be ascribed to **the** existence between them of amicable relations, which **they** were unwilling to disturb. They had a falling out in 1865, and the report of Hood, the referee, shows that in bad **faith** Rider tried to get the advantage of White. So that **no** **ne** of these considerations avail to explain the delay.

The cases are numerous in which courts of equity **have** refused relief because of the staleness of the claim and **un**explained laches, where the delay to sue was much less **than** twenty years.

In the case of McKnight *vs.* Taylor, 1 Howard, 161, a **bill** was filed in August, 1837, by a trustee, under a deed of trust executed in September, 1813, to enforce the **payment**

of one of the claims named therein, by a sale of the property. The Supreme Court, in refusing to enforce the deed, uses this language in the opinion delivered by Chief Justice Taney: "In relation to this claim, it appears that nineteen years and three months were suffered to elapse before any application was made for the execution of the trust by which it had been secured. No reason is assigned for this delay, nor is it alleged to have been occasioned in any degree by obstacles thrown in the way by the appellant. As the record stands, it would seem to have been the result of mere negligence and laches. * * * If, indeed, the suit had been postponed a few months longer, twenty years would have expired, and in that case, according to the whole current of authorities, the debts in the schedule would all have been presumed to be paid. But we do not found our judgment upon the presumption of payment, for it is not merely upon the presumption of payment or in analogy to the Statute of Limitations, that a court of chancery refuses to lend its aid to stale demands. There must be conscience, good faith and reasonable diligence to call into action the powers of the court. In matters of account, where they are not barred by the act of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice, where the original transactions have become obscure by time, and the evidence may be lost."

So in *Wilson vs. Hagerstown Bank*, 27 Maryland, 51, the court held that an equitable mortgagee was barred by laches in waiting until 1859 to set up a claim which accrued about 1851.

In *Hawkins vs. Chapman*, 36 Maryland, 101, the court, in refusing relief upon the same ground, says: "It thus appears that seventeen years elapsed before any attempt was made to execute the trust, and then the bill was filed against the widow and heirs of the purchaser twelve or eighteen months after his death, and several years after the purchase."

And in *Hall vs. Clagett*, 48 Maryland, 223, the court dis-

missed a bill filed in 1856 by a surviving partner against the representatives of the deceased partner, who died in 1855, for an account of the copartnership dealings, extending back many years, and which had been dissolved in 1842. In refusing to interfere under the circumstances, the court says: "The repose of titles and the security of property are mainly promoted by a full enforcement of the maxim, '*vigilantibus non dormientibus jura subveniunt*.' The spirit of the maxim '*interest reipublicæ ut sit finis litium*,' may be traced to a more remote period than the Christian era. The language of the civilians, and of the commentators upon the common law, has been that the dominion of things must not for a long time remain uncertain, so as to disturb the peace of society by giving rise to innumerable and perpetual litigations."

"To prevent such evil, the indolence of those who are dilatory in recovering their property and claiming what is due to them, should be punished, and they should impute to themselves the punishment." Angell on Lim., § 9.

We have no hesitation, in view of these principles and their application in these and numerous other cases, in declaring that the bill was properly dismissed by the court below.

THOMAS HENSON ET AL. vs. RICHARD E. HILL ET AL.

EQUITY. No. 6806.

{ Decided October 27, 1884.

{ Justices MAC ARTHUR, HAGNER and JAMES sitting.

The scrutiny with which courts of equity regard a deed between parties holding a confidential relationship to each other, proceeds upon the principle that before and at the time of the conveyance, the grantor holds such a relation to the grantees as to place him in contemplation of law mentally under his control and domination; and it is important in making out this confidential relation, that it should be shown to have preceded the whole transaction. Proof that it was contemporaneous with and grew out of the transaction itself is not sufficient.

THE CASE is stated in the opinion.

S. S. HENKLE for plaintiffs.

T. F. MILLER for defendants.

Mr. Justice JAMES delivered the opinion of the court.

The bill in this case states that on the 28th of April, 1879, Ellen Jones died seized of certain property in this city, having devised it to the Israel Methodist Church; that the will was inoperative, because it was made within a period of thirty days before her death. That on the 2d day of January, 1877, more than two years before her death, she was induced and persuaded by the defendant Richard E. Hill to execute and deliver to him a deed of these lots for a consideration of ten dollars, while the lots were worth \$1,600 or \$1,700. That on the same day, Hill and his wife executed a deed reconveying to her, Ellen Jones, a life estate. The bill then alleges that the deed was without any consideration in money, property or relationship, and was procured by undue artifice and fraud.

It is further stated that Ellen Jones, not long before her death, employed counsel to draw a bill in equity, with a view to having this conveyance nullified; that she had signed it and sworn to it, but died before it could be filed. Then the complainants reiterate the charge as made in that bill, and their charges so reiterated make these points: That at the time when Ellen Jones made this deed she

was prostrated by a severe spell of sickness, and was in a low and feeble state of mind and body, and in no condition to transact business at any time with discretion and judgment, and that the defendant Hill, by artifice and fraud, and by affecting to take an unusual interest in her welfare, prevailed upon her to make a deed. That they are informed and believe, that she, Ellen Jones, was ignorant of the nature, effect and object of the deed to Hill, and also of the conveyance by Hill of the life estate back to her, and that at the time of the execution of these deeds, it was never her intention to part with the absolute title to her property.

The next allegation has been assumed in the argument as charging another ground for relief, and it is substantially in these words: That at the time of the execution of the deed she, Ellen Jones, was a little behind in her taxes, and owed some other debts, and Hill suggested and advised her to allow him to borrow for her some \$200, to be secured by a deed of trust, which he succeeded in doing, and the deed of trust was presented to her for execution on the same day the others were executed, and it was signed by her when she was so sick that she hardly knew what she was about. That William Ward was made trustee in this deed of trust; that two hundred dollars was borrowed and never has been paid, and is a subsisting lien upon the property. The plaintiffs infer and believe that the money raised went into Hill's hands. He paid some of the taxes and other small debts, sent her two loads of coal, some wood, and paid her a small proportion of the money, how much is not known, but he appropriated, it is alleged, more or less to his own use, and should be required to report and produce vouchers for what he expended on her account. These allegations were used in the argument as making the point that he stood in the confidential relation to her of agent.

This case, therefore, turns upon two questions. First, whether there was active fraud; and, secondly, whether any such confidential relation existed as to call for the enforcement in a court of equity of those obligations which arise out of such a relation.

In the first place, as to the question of fraud, it is stated that Ellen Jones was at the time of this transaction sick and feeble, and really incapable of understanding the transaction, and that, as a matter of fact, she did not understand it. Among all the witnesses who have been examined, nobody was present at that transaction except Mr. Robert Ward, an examiner of titles and a conveyancer at that time. He is a lawyer of intelligence, and testifies that, being called upon to prepare the papers, he explained to Mrs. Jones the effect of making a will and the effect of making a deed. We think it is quite clear, from his testimony, that the grantor was capable of knowing what she was about, and capable of understanding perfectly the difference between a transaction which she could revoke at any time, and a transaction which was irrevocable.

[His honor then read the testimony upon this point, and continuing, said:]

We do not find anything in this testimony which sustains the charge of active fraud or undue influence.

It is contended, however, that *she* thought so, because she filed a bill afterwards—more than two years afterwards—for the purpose of revoking this whole transaction, in which she made that charge of fraud. But that could only prove the attitude she took two years afterwards. It does not at all prove the fact that she failed to comprehend the transaction when she performed it, or the fact that she did not intend to make it two years before that. That was her allegation under circumstances of dissatisfaction.

But it is alleged that Hill bore to her the confidential relation of agent. And the doctrine is invoked that a conveyance, a gift, between a principal and agent, is to be watched with the utmost scrutiny; it was claimed that such a deed was *prima facie* void, and that it lies upon the agent to show that the utmost fairness was exercised, and that the donor or grantor had independent and disinterested advice. The principle with regard to these cases of confidential relationship is this: That before and at the time of the conveyance, the grantor holds such a relation to the grantee

as to place him in contemplation of law mentally under her control and domination. It is important, therefore, in making out this confidential relation, that it should be shown to have preceded the whole transaction. But here it was the very thing itself. Here was a little loan of \$200, effected simultaneously with the execution of the deed. No earlier agency is shown; none is alleged. All there is of it is that in the very act of determining to give him this property either by will or deed, she employed him to clear up the taxes, by borrowing some money for her upon the property. The agency is not antecedent to the transaction, but it is a part of it, and contemporaneous with it.

But, after all, who was really the agent? Hill appeared to have gone to a lawyer, and the result was that the lawyer was brought to Mrs. Jones. The lawyer, Mr. Ward, effected this loan. He states in his deposition that they told him that they wanted to raise some money to pay off the taxes and he said he would raise it for them; which, he says, he did. It is shown distinctly, therefore, that it was Mr. Ward and not Hill, who effected the loan. All that Hill did in the matter was to inform Mr. Ward that she wanted to raise some money.

We do not find, then, that even in that single transaction there was any such agency as would invoke the principle sought to be enforced. But whatever the relation was, it is plain that it was not antecedent. She did not enter in this transaction with Hill surrounded by that atmosphere under the influences of an already existing relation—but it was one that was created contemporaneously with it.

If we look through the numerous cases cited by Hare and Wallace upon this subject, it will be found that in all of them there was a prior relation which the law presumed to have controlled the mind of the grantor.

It was also pointed out to us that the consideration of the conveyance was ten dollars, and it was contended that this was inadequate, and that it was not admissible to prove a different kind of consideration than that named in the deed, that when a money consideration is stated, it was not admissible

sible for Hill to prove that he had rendered her services. There was an attempt to do that, but that was not necessary. We take the deed just as it stands. It was, it is true, a deed upon a consideration of ten dollars, but that was a nominal consideration, for if this conveyance was anything, it was a gift.

It is not necessary to go outside of the deed to determine what its character was, but if we should refer to anything else, it would be to the fact that her intention was just before that to devise the property to Hill; that this deed was a substitute, and avowedly a substitute. There was no intention whatever to sell the land for its value. So that the sufficiency of the consideration does not become one of the questions in the case.

But it is said that in the case of a gift there must appear to have been independent advice—disinterested advice. The reply to that is, that the whole matter is shown by the testimony to have been explained to the grantor, not by the grantee, but by counsel whom she paid, and who was disinterested and independent, taking nothing by any of these transactions except his fee.

With regard to her state of mind towards her relations. Could the circumstances have had any effect in turning her away from them? She told Mr. Ward, at the time of the transaction, that she did not intend her relatives to have anything to do with the property, and in the end she gave this very property to the church; so that from the beginning to the end she, at least, intended that these relatives should take nothing. It is plain that she was not turned aside from them by any advice that Hill gave.

We think, then, in conclusion, that the confidential relation alleged to have existed between the grantor and grantee did not precede the transaction in which this lady undertook to give this property to Hill. And if it is necessary to go further than that, that there is no proof of any such relation having existed at any time, it is all denied by the answer, and there is no proof in that direction on the part of the complainant.

We affirm the decree of the court below.

ROSA P. STEELE VINCENT vs. CHARLES VINCENT.

IN EQUITY. No. 8241.

{ Decided October 27, 1884.

{ Justices MAC ARTHUR, HAGNER and JAMES sitting.

1. A decree may be amended or corrected on motion where the amendment or correction desired is merely to conform the decree to the decision of the court, as where there has been a mistake in computation, or a mistake of the clerk in entering the decree or the like; but where the decree is attacked in its terms and substance or where any of its material provisions are sought to be varied, a rehearing of the case is the proper practice, and though this court has countenanced the practice of altering a decree even in its material provisions, upon motion, it is in substance really a motion for a rehearing.
2. A party who moves the court by petition to alter one of the provisions of the decree cannot appeal from the decree until his motion is disposed of; such an appeal will be dismissed on motion.

THE CASE is stated in the opinion.

JEFF. CHANDLER and H. W. GARNETT for plaintiff.

WM. E. EARLE for defendant.

Mr. Justice MAC ARTHUR delivered the opinion of the court.

This is a bill for a divorce filed by the wife against the husband. The husband answered and defended on the ground that he was not obnoxious to the charges of the bill which were that he was an habitual drunkard, and had been for three years previously thereto, and had committed such legal violence as amounts to cruelty under our statutes which would justify a divorce on that ground as well. He filed a cross bill after the testimony had been taken upon the original bill and answer, in which he recriminated upon her the charge of adultery. To this cross-bill the plaintiff answered, denying the material allegations. Testimony was taken in regard to both these branches of the case, and the original bill and the cross-bill were heard at the same time and disposed of in the same decree. The decree dismissed the cross-bill and sustained the original bill, and granted the divorce prayed for by the complainant. There were three children, all of whom were confided by the de-

cre to the custody of the wife with a reasonable opportunity of being visited by the defendant.

The case was presented here first upon a motion to **dismiss** the appeal. The discussion of that motion was **postponed** until the general hearing of the case, when it, as **well** as the case upon its merits, were submitted together.

The motion arises upon the practice which has been **pursued** in the special term immediately following the passage of a decree. The decree of divorce was granted on the 2d of October, 1883. On the 4th of the same month, or two days afterwards, the defendant filed a petition to alter the decree in regard to the custody of the children, giving him greater privileges with regard to access, and requiring the complainant to have them within the District of Columbia for four months during the year, and that she should permit them to visit the mother of the defendant alternate Sundays. That was the prayer of the petition. We have been unable to find in the papers the petition itself, but the counsel on the argument concur that in its purport and contents it was a petition to alter the decree. That was on the 4th of October, and on the 6th, two days after this petition was filed, an appeal was taken, and on November 3d the decree was altered in that respect, but during the same term in which the original decree was passed.

We have, then, a decree, a petition to alter the decree, **third**, an appeal, and fourth a decision upon the petition granting the relief prayed for by the defendant. It is contended that by making the motion to alter the decree the defendant was estopped from taking an appeal during its pendency, or until it had either been withdrawn or determined, and that, in any event, inasmuch as he filed the petition and pressed it to a final determination, thereby obtaining the relief which he sought for, it was a waiver of the appeal which had been taken. Upon these grounds the motion to dismiss the appeal was argued.

Now, it is so well established that it is no longer a matter of dispute, that the Special Term has the right of modifying its decrees during the term. This is sometimes done by

motion, and sometimes it is done upon a rehearing of the case itself. When there is any amendment or correction to be made in the decree in order to make it conform to the decision of the court, as where there has been a mistake in computation, or a mistake of the clerk in entering it, or any other mistake which does not conform to the decree or the decision of the court, there can be no doubt that a motion to that effect may be made. The general chancery practice requires, however, that if the decree is attacked in its terms and substance, or any of its material provisions are sought to be varied, you must ask for a rehearing of the case, and that such relief cannot be granted upon a motion. With us, however, I believe that very frequently this relief is granted upon motion. I suppose it is a much easier mode of practice; it is less expensive and less troublesome, and therefore the practice has been countenanced of altering a decree even in its material provisions upon motion; but it is in substance really a motion for a rehearing.

Now, can a party who makes a motion to rehear his case afterwards take an appeal from the decree which he wishes to have reheard? We think not. We are of opinion that the petition to alter the decree should have been disposed of before the appeal was taken, and that no appeal could be taken until that motion was disposed of. Especially must this be the practice when the petition has been heard and determined, and the relief which has been prayed for has been granted. It was likened to the issuing of an execution after an appeal had been taken to the Supreme Court of the United States from one of the circuits. As we all know, the execution may issue notwithstanding the appeal unless it has been superseded; but if a party under these circumstances should file his bond, of course the case would be superseded and all proceedings would be stayed.

But that is not the case here. Here is a party asking for an alteration of the decree itself, and subsequently taking an appeal from that decree. We are of opinion that the practice adopted in this respect is erroneous, and that the

has been no valid appeal in this case in consequence of this irregularity.

But this case was, at the suggestion of the court, argued at the same time with the motion. It was argued with great earnestness and much ability, and counsel for both the parties have also furnished the court with very carefully prepared briefs in the case, and we think in justice to the case and in justice to the parties the court should express an opinion upon the merits, for the purpose of obviating the trouble, the anxiety, and perhaps the scandal which will attend a further and useless litigation of this case. We have therefore concluded that it was due to the case that we should examine it and pronounce upon its merits.

Now, without going into the details of the testimony that was taken for the purpose of sustaining the cross-bill which charged adultery upon the complainant, we are all very clearly of opinion that the testimony is insufficient to establish the charge. It is not my purpose to go over the testimony upon this branch of the case, but simply to announce our conclusion that the charge is not sustained by the testimony. The case then is left upon the original bill and testimony.

[His honor here reviewed the testimony as to the charges made in the original bill, and, concluding, said:]

We think it would be impossible for an impartial man to come to any other conclusion in this case than that the charge of habitual drunkenness is sustained by the testimony. So if there was a valid appeal in this case we should have to affirm the decree. But, as it is, we shall simply have to dismiss the appeal and remand the case for further proceedings in the Special Term. There is an application for an attachment against the defendant, and the order made here will contain a direction to the Special Term to proceed with that application. The appeal must therefore be dismissed, and the case remanded for further proceedings.

IN THE MATTER OF JAMES BARNARD SHUGRUE.

HABEAS CORPUS. CRIMINAL DOCKET. No. 15,476.

{ Decided November 4, 1883.

{ The CHIEF JUSTICE and Justices MAC ARTHUR and JAMES sitting.

1. Sections 1418 and 1419 of the Revised Statutes of the United States do not apply to enlistments in the marine corps.
2. A person under twenty-one years of age cannot be enlisted in the marine corps without the consent of his parent, where such parent retains his right of control.

THE CASE is stated in the opinion.

B. J. LOVEJOY for petitioner.

A. S. WORTHINGTON and RANDOLPH COYLE for respondent.

Mr. Justice JAMES delivered the opinion of the court.

The petitioner, James Shugrue, states that his son, James Barnard Shugrue, a minor, left petitioner's house and custody on or about the 8th of September, 1884, without petitioner's permission, and offered himself for enlistment in the United States Marine Corps; that he was illegally received therein at the city of Washington without the knowledge or consent of petitioner, and is still in the unlawful custody of Colonel Charles D. McCauley, commandant at the marine barracks in Washington. Colonel McCauley's return sets out the facts of the application and enlistment, and states that respondent believes James Barnard Shugrue to be over eighteen years of age. Respondent exhibits with his return a copy of the application and consequent enlistment. The latter is in the following words: "I, James Barnard Shugrue, born in U. S., Dist. of Col., Town of Washington, aged 21 7-12 years, and by occupation a farmer, do hereby acknowledge to have voluntarily enlisted, this 8th day of September, 1884, as a private in the United States Marine Corps, U. S. Navy, for the period of five years, unless sooner discharged by competent authority; do also agree to accept such bounty, pay, rations and clothing as are or may be established by law. I further agree to accept and acknowledge all acts of Congress relating to the United

Marine Corps from its organization to these presents, also such other act or acts as may hereafter be passed by the Congress of the United States having relation to the Marine Corps of the United States during the time of my enlistment. And I, James Barnard Shugrue, do solemnly swear that I will bear true allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies and opposers whomsoever, and will obey the order of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles for the government of the land and navy of the United States; and further that I am of the full age of twenty-one." This paper was sworn to before Major Houston, who was in charge of the recruiting station.

It was agreed at the argument that the actual age of this defendant is between eighteen and nineteen years. Conceding that the respondent claims that minors of that age are competent, under the operation of the following provisions of the Revised Statutes, to enlist in the marine corps without the consent of parents or guardians:

§ 1418. Boys between the ages of fourteen and sixteen may be enlisted to serve in the navy until they arrive at the age of twenty-one years; *other* persons may be enlisted to serve for a period not exceeding five years, unless sooner discharged by the direction of the Pres-

§ 1419. Minors between the ages of fourteen and sixteen years shall not be enlisted for the naval service without the consent of their parents or guardians.

§ 1621. The marine corps shall at all times be subject to the laws and regulations established for the government of the navy, except when detached for service with the army by the order of the President, and when so detached they shall be subject to the rules and articles of war prescribed for the government of the army."

In the application of these provisions it is claimed, first, that § 1418 provides for *two classes of persons* as well as

two periods of enlistment; the first class including boys between fourteen and eighteen years, the second *all other* persons, and, necessarily, among the latter boys over eighteen; secondly, that section 1419, by requiring the assent of parents or guardians in the case of one of these classes, while it imposes no such condition to the other, intends that such consent is unnecessary in the other case; unnecessary, that is to say, as well to boys over eighteen as to adults included in that other class; and thirdly, that section 1621 applies these provisions to enlistments into the marine corps when it declares that the marine corps shall be subject to the *laws* and regulations established for the government of the navy, except when detached for service with the army.

For the purposes of this case it may be conceded that sections 1418 and 1419 taken together, authorize the enlistment of minors over eighteen "to serve in the navy" without the consent of their parents or guardians; the question still remains to be considered whether this general provision relating to enlistments "to serve in the navy" has any application to enlistments into the marine corps. It was claimed at the argument, on the part of the respondent, that it does so apply, because the marine corps is a part of the navy; and that it was held to be so by the Supreme Court of the United States in the case of *Wilkes vs. Dine-more*, 7 Howard, 89. In that case the re-enlistment, under the provisions of the act of March 2, 1837, 5th Stat., 152, of persons "enlisted for the navy" was one of the matters under consideration. The defendant in error had entered into a contract of re-enlistment as a marine before the expiration of his first term, and before the sailing of the exploring expedition, and the question was whether that was, within the meaning of that act, the re-enlistment of a person "enlisted for the navy." Another provision of the same act authorized the detention and continued service of persons "enlisted for the navy" after the expiration of their enlistments and without re-enlistment. The further question was, whether *this* power applied to marines as persons "enlisted for the navy" within the meaning of that act.

As to the validity of Dinsmore's alleged re-enlistment, the court said: "It is certainly no forced construction to consider them (marines) as embraced *in the spirit* of the act of 1837, by the description of persons enlisted for the navy." And in speaking of the power to detain after the expiration of an enlistment during an unfinished voyage, they said: "Considering the marines as embraced *in the spirit, if not the exact letter*, of this provision, for reasons heretofore assigned, connected with its language and object, and their position in conjunction with the navy, it would follow that the commander, supposing the detention of the plaintiff on board essential to the public interests, could rightfully direct him to remain."

The hesitating terms in which the court thus identified marines with persons "enlisted for the navy" cannot fail to attract observation. And it must be observed, too, that the reasons given by the court for holding marines to be persons "enlisted for the navy," within the spirit of that act, were peculiar to the case presented by that act, and do not apply to an original enlistment. The court did not decide the broad proposition that a marine is in all cases a person "enlisted for the navy;" they held him to be such within *the spirit of that particular act*. After a careful consideration of Mr. Justice Woodbury's reasoning in arriving even at that limited conclusion, we shall not extend it to any but the very case presented in *Wilkes vs. Dinsmore*; and we have no hesitation in holding that the question, whether an original enlistment into the marine corps under the general provisions for enlistment, is an enlistment "to serve in the navy," and as such is governed by sections 1418 and 1419, comes before us uncontrolled by any decision of the Supreme Court.

The historical consideration, to which Mr. Justice Woodbury gave some weight, was presented to us, that when the naval armament was first established, marines were strictly enlisted into the navy. Undoubtedly this was the character of their enlistment under the acts of 1794, 1797 and 1798, providing for the construction and manning of certain

ships; but we are of opinion that the act of July 11, 1798, 1st Stat., 594, by which the marine corps was established, worked a complete change in the matter of enlistment, and in the status which mere enlistment produced. The corps was established by that act as a complete organization, and neither that act, nor any subsequent act, contains any declaration or implication that, as a corps, it was to be a part or branch of the navy. We observe that, in demonstrating the status of a "marine," within the spirit of the act of 1837, Mr. Justice Woodbury gave some little weight to his mere name. If such considerations are to have any weight, it should be noted that the original act of establishment contains a phrase which is more suggestive of an army than a navy status. Its very first sentence provides, "*that, in addition to the present military establishment, there shall be raised and organized a corps of marines.*" "Military establishment" was the common legislative designation of the army of the United States, and, if it were not for subsequent provisions as to the service of the corps, this language might well be taken to express an addition to the army. But phrases are not important in the presence of the provisions of a statute. No doubt the historical uses of marines were still the chief object of this corps; namely, service in connection with the navy; but it was distinctly provided by the original act of establishment, as it has been by all subsequent acts, that marines were to serve with the navy or with the army, just as they might be ordered by the President. These provisions have been embodied in sections 1616 and 1619 of the Revised Statutes. Section 1616 provides that "marines may be detached for service on board the armed vessels of the United States, and the President may detach and appoint, for service on said vessels, such of the officers of said corps as he may deem necessary." And section 1619 provides that "the marine corps shall be liable to do duty in the forts and garrisons of the United States, on the sea coast, *or any other duty on shore, as the President, at his discretion, may direct.*" The nature of its shore service is further indicated by sec-

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serve until they shall arrive at the age of twenty-one years. Under this clause a boy may be enlisted for a little over three years. But section 1608 provides that "enlistments into the marine corps shall be for a period *not less than five years.*" Of course *this* clause is inapplicable to marines. The second clause provides that "other persons may be enlisted for a period *not exceeding five years.*" It permits enlistments, therefore, for a period of less than five years, and is, equally with the first clause, inapplicable to marines, who cannot lawfully be so enlisted.

Finally, the argument that, even if sections 1418 and 1419 do not of their own operation cover enlistments into the marine corps, as enlistments to serve in the navy, yet they have been in fact applied to those enlistments by section 1621, must fail, because, as a matter of construction, the latter section was not intended to bear at all upon the subject of voluntary enlistments. It provides that the marine corps shall at all times be subject to the *laws* and regulations established for the *government* of the navy, except when detached for service with the army by order of the President." But a law providing one of the terms of a voluntary enlistment is not in any sense a law for the government of the navy. Government applies to persons who by some act have subjected themselves to government, but this provision merely relates to a *contract* which the United States propose to make with persons as yet entirely free from these navy laws. The very largest application of which this provision is susceptible was made in the case of *Wilkes vs. Dinsmore*, already referred to. It was there held that the provision of the act of 1837, which authorized the compulsory detention of a seaman whose period of enlistment expired during a voyage when his continued service might be indispensable to the safety of the ship, was a law for the *government* of the navy, and, therefore, was strictly applied to marines by the provision which is now embodied in section 1621. This ruling serves to illustrate the distinction pointed out. No such character or operation can be imputed to a law regulating a contract to be made with a person not yet in the

service. Such a law may govern a contract, but it does not govern persons. We hold, then, that section 1621 makes no figure in this matter.

The only provisions of law, then, which in any way bear upon this matter are section 1596 of the Revised Statutes, which prescribes the number of men to be enlisted into the marine corps, and section 1608, which simply prescribes the period for which such enlistment shall be made. There is no express provision touching qualifications. In the absence of any such provision, what are we to understand to have been the intent of a simple provision for enlistment as to the question before us?

It was, of course, in the mind of Congress, that enlistment involved a contract, and, therefore, contracting capacity. As the United States, as such, has no common law, and Congress has established no general rule as to the age of majority and of capacity to contract in those cases of contract which are under its control, it follows that it must have been intended that this contract was to be made by persons whose contracting capacity was already determined in some other way. It was known to Congress that, by a rule prevailing universally in the States of this Union, a person under twenty-one years of age was not capable of making an absolutely binding contract, and that his time and services were subject to the claim and control of his father while the latter maintained or was ready to maintain him. It is not to be presumed that Congress has intended to interfere with this known right, although it had the power to do so, when it has not expressed the intention to do so. We must conclude, then, that Congress intended that this known domestic right should stand undisturbed, and did not intend that any person under twenty-one years of age should enlist in the marine corps without the consent of his parent, where such parent retained his right of control. It must be added that this assumption that Congress knew and had in mind that general rule of State law as to minority and parental right, is not a mere assumption without corroboration. The existence of that rule has been distinctly recognized by it in

other legislation on this class of subject. Section 1117 of the Revised Statutes provides that "no person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians; provided, that such minor has such parents or guardians entitled to his custody and control." This is a complete recognition by Congress of the legal proposition that minors, persons under twenty-one years of age, are primarily under the custody and control of parents, and have not an independent contracting capacity. Such a provision recognizes that this status of incapacity and this parental right exist, until Congress, by its paramount power in this particular matter, alters that status and interferes with that right. No intention so to overrule the existing status and right has been expressed. Both, therefore, stand, and it follows that the enlistment now under consideration was unauthorized. A discharge is accordingly ordered.

JOHN BURNS vs. METROPOLITAN BUILDING ASSOCIATION.

EQUITY. No. 7445.

{ Decided November 10, 1884.

{ The CHIEF JUSTICE and Justices MAC ARTHUR and JAMES sitting.

The terms of a building association contract with its borrower or advancee,
dis discussed and held not to be usurious.

THE CASE is stated in the opinion.**T. JESUP MILLER** and **R. B. LEWIS** for plaintiff.**WM. HENRY BROWNE** for defendant.**Mr. Justice JAMES** delivered the opinion of the court.

The transaction out of which this suit grows was of the ordinary kind under the usual articles of these building associations, in which the borrower or advancee, whichever he may be called, receives a certain amount of money proportioned to the stock held by him under the rules of the association, and gives a bond, not for the repayment of the money, but binding him to do a specific thing, to wit, to pay upon each share of his stock two dollars monthly, and to do so until there shall have been realized a profit of fifty per cent. on the stock of the association. In addition to this bond, he gives also a deed of trust as a further security for the performance of his obligation. The trust authorizes the trustees in case of default in performance to sell the property, and in making their distribution of the proceeds to retain the amount of this advance or loan. The only positive and absolute obligation which the borrower or advancee enters into, is to pay two dollars a month for a period of time as yet unascertained.

In this case the complainant, who has filed a bill to restrain the trustees from selling this property under the trust, had received a certain advance and had made considerable payments. He then ceased, on the assumption on his part that the time had arrived, according to the contract, when no further payments could be required of him.

One of the grounds upon which he claims relief is that the contract is *usurious*, and that he is not bound to perform it beyond the payment of the principal.

We have held in the cases of *Pabst vs. Building Association*, 1 Mac A., 385, and in the case of *Mulloy vs. Building Association*, 2 Mac A., 594, that contracts similar to this were not usurious. It was contended, however, with a good deal of earnestness, that the opinions in those cases were *obiter dicta* so far as they undertook to decide the question of usury, that the question was not involved in those cases, and that the court ought not to hold itself bound by them as a precedent.

For that reason we have looked into this contract, under the influence, however, of a strong feeling that unless the grounds for holding it to be usurious were very plain, we would not undertake to disturb what has been supposed, for so long a time, to be the attitude of this court.

We take it that usury is involved only when there is an absolute undertaking binding the person to do a certain thing, namely, to pay back the principal of the loan, and, whether by contract or by some artifice, to pay usurious interest. Here there is no undertaking at all to repay the principal of this loan. The undertaking is to pay two dollars a month on this stock, one dollar of which, it is admitted, is payable as dues, and the other as a contribution to the profits upon the stock. But that undertaking is not to continue for any specific length of time. Its performance may continue a longer or shorter period, and if all of the borrowers, or parties upon whose stock money is advanced or loaned keep their promises, the period is shortened because just so much sooner does the period arrive when the profits on the stock amount to the stipulated fifty per cent.

To the extent that the period is shortened by the performance of the contract, the amount to be paid is reduced and the borrower receives in that way the benefit of his payments. There are two elements, therefore, for consideration. The borrower takes, in one case, a part of the

benefit in the execution of the contract, not because the proceeds are distributed to him, but by shortening the period during which he shall pay. The other is, that the form of contract does not oblige him to continue paying for any specific length of time, and does not amount in itself, therefore, to an undertaking to repay this advance. It may happen that he may be discharged from the obligation to continue these payments before he shall have paid back the principal and the legal interest. The probability may be the other way, but the undertaking does not make it so.

The result, then, is that the contract is not in itself usurious. The borrower, it is true, has the privilege of discharging himself, at any time, from his absolute obligation to pay two dollars a month, by coming forward and settling up with the association, and the argument that this was an usurious contract was rested chiefly on the theory that such a settlement could not be had except upon the basis of usury. But even supposing that to be the case, viz., that the settlement would involve the payment of more than the principal and legal interest. Yet it is not a settlement which the borrower is bound to make. He has the choice either to perform an obligation which is not in itself usurious, or discharge himself from its performance by selecting another mode of settlement. An alternative which a person may adopt from choice, not being an obligation, cannot itself be an usurious contract: it is only a method which he may adopt of discharging himself from another contract.

Again, the plaintiff comes here for equitable relief, and asks this court to interpose in his behalf, and I think we all agree that the principle fairly applies that he must perform his contract first. He informs us that he proposes to discharge himself from the obligation to pay two dollars a month by adopting the alternative that had been offered to him, and he cannot ask us to relieve him unless he is willing to perform and does perform this alternative. The result is that the account must be stated according to the contract between him and the association as exhibited in the con-

stitution which is referred to in his deed of trust as a part of the contract, and which furnishes the evidence of it.

The conditions on which he may offer that settlement are expressed in article 15 of the articles of association, which provide that "any stockholder desiring to settle an advance shall be charged with the actual amount advanced to him, and credited with the amount of dues paid in upon the stock upon which such advance has been made, thereby canceling said stock, and shall be allowed the same amount of interest on said payment of dues as is allowed to those shares withdrawn, on which no advance has been made; and upon the payment of the balance found to be due the association he shall be entitled to a deed of release."

At the time when this transaction was initiated, the constitution provided, by the next article, that stockholder might withdraw, receiving back their dues, and ten per cent profit. The constitution, as it is called, although it is only the articles of agreement between the members of a voluntary association, and not the members of a corporation, provides for its amendment by the vote of two-thirds of all the stockholders present at one of the regular monthly meetings. This was undertaken, it is said, at a regular monthly meeting. This proof of amendment was not produced, but by consent of the parties, the minutes were brought into court, the minutes merely set out the general fact that the amendment reducing this ten per cent. profit on the dues paid in, to six per cent. had been passed. An accompanying affidavit set forth that it was done by a unanimous vote, and, therefore, of course, by a vote of two-thirds of all the stockholders present. This affidavit was admitted subject to any objections as to its force.

But even if it be conceded that the amendment was proven by competent testimony to have been adopted, its adoption would not alter the contract that had already been entered into. The provision of this constitution allowing amendments to be made in future, is not to be construed as authorizing two-thirds of the stockholders to alter a contract which had already been made. They might make future arrange-

ments under it, but not change the existing rights of parties. Moreover, it is to be observed, that the amendment was not of this 15th article, but of the article specifically relating to persons who wish to withdraw entirely from the association. We construe this 15th article, therefore, as being unchanged, and requiring that the borrower or advancee, desiring to set up, shall be credited the amount that he has paid in monthly on his stock ; that is to say, the dollar a month, and six per cent. on that and the balance he must pay. Now, if the plaintiff wants our assistance, he must perform either the contract he has entered into or the alternative he has adopted for discharging himself. The auditor has ascertained the amount required for settlement, calculating the interest at six per cent., but the account is easily recast by adding four per cent.

This was the obligation of the plaintiff when he commenced his suit, and as he has delayed the association by withholding payment, he must pay interest during that time.

The decree can easily be made up from these elements.

MARGARET HETZEL

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

LAW. No. 15,713.

{ Decided December 1, 1884.
 { The CHIEF JUSTICE and Justices MAC ARTHUR and JAMES sitting.

Where a party makes a motion for a new trial within four days after the rendition of the verdict, he is entitled to have his motion passed upon by the court, and if, in the meantime, judgment has been entered, it remains subject to be set aside if a new trial be granted. So, too, with the motion in arrest of judgment if made in proper time. The fact that no suspending undertaking or bond is given, cannot affect the right to have those motions passed upon by the court. The giving of this suspending bond is not a condition precedent to the motion. The party takes only the risk of an execution being issued and a levy and sale made in the meantime. But if the motion for a new trial and the motion in arrest of judgment have been heard, and pending these motions, no levy has been made, then, if the party appeal and give his appeal bond, all further proceedings under the execution are stayed.

STATEMENT OF THE CASE.

MOTION to direct the marshal to suspend execution.

The verdict in this case was rendered June 5, 1884, and judgment was entered thereon on the same day.

On June 7, 1884, a motion for a new trial was filed. On July 9, 1884, a writ of execution was issued. On July 14, 1884, the defendant moved to quash the writ of execution and to vacate the judgment. Both motions were argued and overruled on the 19th day of July, 1884. Thereupon, the defendant immediately filed a motion in arrest of judgment. This motion was also overruled; whereupon the defendant appealed, and gave an appeal bond which was approved. The questions involved in the case are the construction to be given the 62d and 69th rules of court, and whether, by the proceedings in this case, the writ of execution was suspended.

The rules of court in question are as follows:

"RULE 62. No motion for a new trial on a bill of exceptions shall suspend the entry of judgment, or the issuing

and levy of execution; but a stay of execution shall be entered if the party making the motion shall, within ten days after judgment, execute and file in the cause an undertaking with one or more sureties, to be approved by the court, or a justice thereof, in the form provided for in Rule No. 91 in cases of appeal, and the court may, upon cause shown and notice, stay execution within the ten days and enlarge the time for filing the undertaking.

“No motion for a new trial for any other cause shall suspend the entering of judgment and issuing of execution, unless the party moving shall, within ten days after verdict, execute and file in the cause an undertaking, with one or more sureties, to be approved by the court or a justice thereof.

“RULE 69. If a motion for a new trial, under second paragraph of Rule 60, or a motion for a new trial on exceptions entertained by the judge who tried the case under the first paragraph of Rule 60, be overruled, and the court decide that the verdict shall stand, then the party may move in arrest of judgment.

“This motion shall be made in writing, signed by counsel, and be made of record on the minutes of the court, and it shall state the reason or reasons relied upon in support of it. If several reasons be assigned, they shall be set forth separately, and each shall be numbered.

“No motion in arrest of judgment shall suspend the entry of judgment and issuing and levy of execution, unless a similar undertaking to that hereinbefore provided in the case of motions for a new trial be executed and filed by the party moving. In case the motion be overruled, the party moving may appeal to the General Term, in which event he may further stay execution by executing and filing the undertaking prescribed in cases of appeals, which shall supersede the undertaking originally filed.”

Rule 60, referred to in the foregoing rule, is as follows:

“RULE 60. Motions for a new trial, which are designed to set aside a verdict and procure a new trial of a case, are of two kinds, to wit:

“1. Those which are grounded upon alleged errors of law

by the justice presiding, in his rulings during the trial admitting or excluding evidence, or in his instructions to the jury; these motions must be made upon a bill of exceptions, and are to be heard in the General Term in the next instance. But the justice who tried the cause may, in discretion, entertain a motion on exceptions taken at trial, to set aside the verdict for error in law.

"2. Those which are grounded upon the following a similar allegations:

"(1.) That the party moving for a new trial had no notice and did not appear at the trial.

"(2.) Misbehavior of the successful party.

"(3.) Misbehavior of the jury.

"(4.) That the verdict is contrary to the evidence.

"(5.) That the verdict is unreasonable or uncertain.

"(6.) That the verdict was obtained by surprise.

"(7.) That a new and material fact, unknown at the time of the trial, and not ascertainable by reasonable diligence by the party moving, has come to light since trial, and is like.

"These motions are addressed to the discretion of the justice presiding at the trial, and are not appealable."

FRANK W. HACKETT for plaintiff.

MERRICK & MORRIS for defendant.

Mr. Justice JAMES delivered the opinion of the court.

This motion involves a construction of the rules relating to new trials and in arrest of judgment. We have found it difficult to harmonize the seemingly conflicting provisions of these rules, and we are therefore very happy to learn that the court is to be offered an opportunity to act upon a proposed revision of them which the gentlemen of the Bar Association have undertaken to draft.

We think, however, that the rule relating to new trials as it stands, in the first place, allows four days for making such motion. That motion was made in this case two days after the verdict was rendered. It appears, however, to

a long continued practice in the circuit court, to enter the judgment immediately upon the rendition of the verdict, or at least upon the same day. Now, whether the common law rule, that judgment shall not be entered upon the verdict until four days have first elapsed, is in force in this District or not, we have no doubt that at whatever period the judgment is entered, a party preserves all his rights by making his motion for a new trial within four days after verdict, and if the judgment has been in the meantime entered, it remains subject to be set aside if a new trial be granted. Rule 62 provides that the making of a motion for a new trial shall not suspend the entry of judgment unless an undertaking with sureties be given. None was given in this case, but the motion remained pending for nearly a month, when it was heard and overruled. Thereupon a motion in arrest of judgment was filed. This was also overruled, and the plaintiff then appealed, giving an appeal bond with sureties approved by the court. We hold that the judgment, which was entered immediately on the rendition of the verdict, was entered subject to the enforcement of all the rights of the plaintiff to have his motions for a new trial and in arrest of judgment acted upon by the court, for a party has as much right to contest the propriety of the judgment as he has to the right of trial by jury, and the fact that the judgment was entered on the same day with the verdict cannot impair that right. The fact that no suspending undertaking or bond was given while the motion for a new trial and the motion in arrest of judgment were pending, could not affect the right to have those motions passed upon by the court. The giving of this suspending bond is not a condition precedent to the motion. The motion may be made, and if the undertaking be not given, the party takes the risk of an execution being issued, and a levy and sale made in the meantime. But if the motion for a new trial and the motion in arrest of judgment have been heard and refused, and pending these motions no levy has been made, then, if the party appeal and give his appeal bond, all further proceedings under the execution are stayed.

This was the method of proceeding in this case. When the motions for a new trial and in arrest of judgment were overruled, the plaintiff appealed and gave a bond approved by the court. When the bond was given the judgment had been entered and execution had issued, but no levy had yet been made. We are of opinion that this appeal bond stopped everything where it found it the moment it was given, and consequently arrested further proceedings under the execution. If it is necessary to make any definite order, it will be that the execution issued in this case stand arrested until the hearing of the appeal now pending.

THE DISTRICT OF COLUMBIA

vs.

THE WASHINGTON GAS LIGHT COMPANY.

LAW No. 24,652.

{ Decided December 18, 1884.

{ The CHIEF JUSTICE and Justices MAC ARTHUR and JAMES sitting.

1. Congress has power to adopt a law by reference to it, without embodying the law referred to in the act adopting it, provided the reference be clear, distinct and unmistakable.
2. The joint resolution of Congress of April 24, 1880, adopting and legalizing certain ordinances of the Board of Health of the District of Columbia rendered those ordinances the laws of the District; and the Police Court of the District of Columbia has jurisdiction to impose and enforce the penalties set forth therein.
3. The District of Columbia v. Bates, 1 Mac A., 493, so far as it refers to the powers of Congress and of the Board of Health in respect of nuisances, unquestioned.
4. An information charging that the defendant "did then and there commit, create and maintain a nuisance injurious to health, consisting of crushing, grinding and burning of shells, whereby noisome stenches and noxious gases arise and are generated," charges a nuisance at common law.
5. When an inferior court is proceeding beyond or without its jurisdiction, the writ of *certiorari* is the proper remedy, but not for mere matters of form and procedure; and it seems that the writ ought never to issue where there is a right of appeal, unless the jurisdiction is called in question, or unless some specific reason is shown why the writ should issue, as that a party has lost his right of appeal through mistake or inadvertence or the like.
6. An objection that the information contains the signature of the prosecuting attorney in printed type, instead of the same being written, is one which relates merely to a matter of form and procedure, which is amendable.

STATEMENT OF THE CASE.

This case was commenced in the Police Court of the District of Columbia, by information filed by the attorney for the District, and charging the defendant with violating an ordinance of the Board of Health against nuisances. Upon application to the Circuit Court of the District of Columbia a *certiorari* was issued, and the case coming up in that court was certified to the General Term to be heard in the first instance.

The information charged the defendant with "creating and maintaining a *nuisance* injurious to health, consisting of crushing, grinding and burning of shells, where noisome stenches and noxious gases arise and are generated which is contrary to and in violation of section 21 of ordinance of the Board of Health of the District of Columbia," &c.

Instead of a written signature the information had annexed to it the printed name of "A. G. Riddle, attorney for the District of Columbia."

Section 21 of the ordinances of the District of Columbia legalized by joint resolution of Congress, April 24, 18 No. 25, is to this effect:

"The crushing, grinding, or burning of bones or shells or any other business or trade whereby noisome stenches and odors and noxious gases arise or are generated within the cities of Georgetown or Washington, are hereby declared nuisances injurious to health, and after due notice from this board to abate the same, shall, upon conviction thereof, be fined not less than ten nor more than one hundred dollars for every such offence."

And it is further provided in the 27th section:

"That all fines and penalties imposed by any section of this ordinance shall be collected by prosecution in the Police Court or other proper court of the District of Columbia by information filed in said court, at the instance of the Board of Health."

The questions submitted at the hearing were the validity of the ordinance, and, if valid, whether the Police Court of the District of Columbia has jurisdiction to impose and enforce the penalty set forth.

A. G. RIDDLE and FRANCIS MILLER for the District.

H. R. WEBB for the defendant.

Mr. Justice MAC ARTHUR delivered the opinion of the court.

This was a prosecution commenced by information in the Police Court, to recover a penalty against the defendant.

for maintaining a nuisance injurious to health. It appears from a statement in the petition that the defendant's plea to the court's jurisdiction was overruled. An application was then made for a writ of *certiorari* to bring the case up here.

The main question to be determined is one of jurisdiction, and the writ of *certiorari* is the appropriate proceeding to raise that question. There are questions in this case in regard to the form of this complaint, but the main question relates to the jurisdiction of the police court in the first place, and, in the second, to the validity of the law under which the proceeding was laid.

It will be remembered that, by the organic act, provision was made for the appointment of a Board of Health. They were authorized to adopt such regulations as were necessary in regard to nuisances injurious to health. They devised a code of ordinances relating to that subject that were quite exhaustive in their nature, referring to every matter that could affect the public health. It will also be remembered that that board was abolished by the act of June 11, 1878, and their powers transferred to the Commissioners. The validity of these ordinances was passed upon by this court in the case of the District of Columbia against Bates, which was a proceeding commenced like this in the police court to recover a penalty for sustaining a nuisance injurious to health, 1 Mac A., 433. A majority of the court came to the conclusion that Congress could not delegate the power of making these ordinances to the Board of Health, and that the board had not the power of defining what should be nuisances injurious to health. Probably, in view of that decision, Congress, on the 24th of April, 1880, passed a joint resolution adopting and legalizing these ordinances of the Board of Health by their titles, without incorporating into the resolution itself the terms in which the ordinances were expressed. The first section of that act refers distinctly to "an ordinance to revise, consolidate and amend the ordinances of the Board of Health, to declare what shall be deemed nuisances injurious to health, and to provide for

the removal thereof," and it legalizes that ordinance, and number of other ordinances are stated by their titles and legalized also, and declared to be the law of the District.

These ordinances have been subjoined by Mr. Richardson to his supplement to the Revised Statutes, on page 574, in note, and extend through several pages of very fine print. They relate to every conceivable subject, properly so too, relating to the safety, comfort and decency of the city, and if the District is without this law, it has no means of protecting its decency or its comfort, and, indeed, it would become uninhabitable for human beings. The court would not be disposed by judicial decision to abrogate an act of Congress relating so extensively and emphatically to the well-being of the inhabitants of the capital, and we think that we are not compelled to do so.

The objection to the legislation is that it is vague and uncertain, and that the resolution does not embody the law which it seeks to enact, &c. We suppose that it is quite competent for Congress to adopt a law by reference to it, to adopt any provision that has been completed by reference to it, if that reference is clear, distinct and unmistakable, and this we think Congress has done, and if the judges of this court should hold that such vagueness, that any uncertainty or any want of distinctness arises out of this resolution, they would probably be the only three individuals in the United States who would announce such a preposterous proposition with any expectation of receiving credit for sanity. We hold very clearly to the opinion that this resolution is not void for the reason of uncertainty or indistinctness.

In addition to what appears upon the face of the resolution itself, I have already referred to the fact that Mr. Richardson in his supplement has subjoined the ordinances in full, not only by their titles, but the body and contents are published, and then by a distinct resolution at the same session Congress declares: "The supplement to the Revised Statutes, embracing the statutes, general and permanent in their nature, passed after the Revised Statutes, with refer-

ences, connecting provisions on the same subject, explanatory notes, citations of judicial decisions, and a general index prepared by William A. Richardson, be stereotyped at the government printing office, and the indexes and plates thereof, the right and title therein and thereto shall be in and fully belong to the Government for its exclusive use," &c. And the close of the resolution is in the following language:

"The publication herein authorized shall be taken to be *prima facie* evidence of the laws therein contained in all the courts of the United States."

A discrimination might perhaps be made upon the language which I have just read. It relates to "laws therein contained;" that language would not apply to the notes subjoined, and we are not disposed to say that that is not a fair and just distinction to make. The only reason why we allude to it now, is to show the clearness and the distinctness with which those ordinances are pointed out, and any man that can read fine print can understand what they are.

There was another matter in this connection which may with propriety be alluded to. Referring again to *The District of Columbia vs. Bates*, the doctrine was there announced that the Board of Health could not adopt regulations in the form presented by these ordinances, declaring what should be a nuisance injurious to public health. The authority of that decision is very much shaken by the decision of the Supreme Court of the United States in the case of *Barnes vs. The District of Columbia*. That was an action brought by the plaintiff to recover damages for an injury received by the negligence of the District of Columbia, in leaving an excavation in a street open, into which he fell and from which he received the injuries complained of. The District in that case took the ground that the Board of Public Works had entire control of the public streets, and that they were authorized by the organic act to adopt such regulations as might be necessary for their preservation and repair; that the officers composing the Board of Public Works were appointed by the President, with the

consent of the Senate; that they were paid by the United States, and were therefore a body, a *quasi* corporation as it were, distinct from the general government of the District, and for whose negligence the District was not responsible. This court was convinced that such ought to be the construction of the organic act, and pronounced against the remedy in that case.

The Supreme Court reversed that decision, and held that the Board of Public Works was simply a part of the municipal government, an agency provided for by law for the purpose of carrying out the details of municipal authority and meeting municipal necessities, and that the District was therefore responsible for their conduct or misconduct. Mr. Justice Hunt, who delivered the opinion, refers at large to the various powers which were delegated to the different branches of the municipal government, as, for instance, that it provided for a Board of Health, for a Board of Public Works, a Legislative Assembly, &c., and distributed the various functions of municipal duty among these various agents, but that in point of fact they all constituted the corporation, and so they held that the District was responsible.

Now, if it be true, according to the doctrine of the Supreme Court, that Congress could delegate to the Board of Public Works a right to pass regulations for the control, repair, &c., of the streets, it seems scarcely less logical, and less legal, that they could delegate to the Board of Public Health the power of passing regulations on that subject. It was really of more vital consequence to the community than any other branch of duty which they delegated to these subordinate agencies; so that we think we are justified in saying that the case of *Barnes vs. The District of Columbia*, 91 U. S., 540, shakes to a very great extent the authority of this court in *The District of Columbia against Bates*. If nothing else was wanted, however, to completely set that decision aside in this particular matter, it would be the legislation of Congress to which I have just referred.

Again it was argued, quoting as authority the *Bates case*, that neither the Board of Health nor Congress could declare

nuisance injurious to health, and that they could declare being a nuisance which was not one at common law. This trine, I presume by fair interpretation of that decision, may deduced from it, but no one will read it calmly without thinking that our lamented and learned brother rather over-stated the law when he said that such an was beyond the power of Congress. But whether Congress has that power or not, we know that if they have not power to declare nuisances injurious to health, that they have very little authority over municipal powers, because police regulations of a densely inhabited city, its sanitary regulations and necessities, are of such importance that that power must reside somewhere else than in the common law. We think it is a just conclusion that Congress may declare what is a nuisance injurious to health. But whether an or not, there is no doubt of one thing, that the complaint in this case does describe a nuisance at common law, or what would constitute a nuisance at common law. declares "that the Washington Gas Light Company, late of the county of Washington aforesaid, on the 21st day of July, in the year of 1883, and on divers other days between that day and the day of the filing of this information, in the District aforesaid, and in the city of Washington, near unto, or upon divers public streets, and also near unto the dwelling houses of divers good citizens of the District of Columbia, to wit, on lot on corner," &c., describing the locality, "did then and there commit, create and maintain a nuisance injurious to health, consisting of crushing, grinding and burning of shells, whereby noisome stenches and noxious gases arise and are generated, which is contrary to law in violation of," &c.

Tell, now a condition of things from which arise noxious stenches, noisome stenches, &c., what are they but nuisances, the common law would take cognizance of? It appears that the argument on all the points against the power of the court to enforce these ordinances must fall.

Then, in regard to the writ of *certiorari*. There is no doubt that where an inferior court is proceeding beyond or

without its jurisdiction, the writ of *certiorari* is the proper remedy, and the court appealed to in such a case for the writ will grant it, and will restrain such inferior court. This, however, will only arise on the question of jurisdiction, and not as to matters of form and procedure. We have, therefore, taken cognizance of this *certiorari* for the purpose of settling the question of jurisdiction.

Another question relating to the jurisdiction, is, granting that this law is valid, can it be enforced in the police court when it has no jury by which a party can have his right adjusted? I suppose that question is *stare decisis* with us. The right of trial by jury is secured by an appeal to this court, and that is a substantial compliance with the provision of the Constitution on that subject.

Objections are taken to the complaint that there is no prayer for process, and that it does not allege want of notice. The 21st section of the ordinances is the one upon which this complaint is founded. It provides for the punishment of whoever shall "continue any such nuisance, and who shall fail, *after due notice* from the board, to abate the same"; and it is declared that there is no allegation of notice in the complaint. It is also objected that the name or signature of the district attorney is printed in roman characters and not in writing. We think that these relate to mere matters of form and procedure, and are amendable. It would be very easy to pray for process, and to allege want of notice. We ought not to encourage writs of *certiorari* for mere matters of form, and the court do not. The old Supreme Court of New York was troubled with applications of this kind, and they finally decided broadly the doctrine that writs of *certiorari* should never issue, where there was a right of appeal, and the party could have a remedy in a superior court, unless the jurisdiction was called in question, or unless some specific reason was shown why the writ should issue, as that a party has lost his right of appeal through mistake or inadvertence, or something of that kind. So we do not think that we ought to pass upon these questions, and simply decide that a writ a

certiorari does not lie for such complaints as the objections which have just been mentioned.

Our conclusion upon the whole is, that this writ must be quashed or discharged, and that an order of *procedendo* must be entered in the case to return it to the police court for further proceedings.

J. A. EDMONSTON ET AL.

vs.

HENRY P. GILBERT ET AL.

LAW. No. 23,859.

{ Decided January 12, 1885.
The CHIEF JUSTICE and Justices MAC ARTHUR.
Cox and JAMES sitting.

1. A note consecutively endorsed by three persons, being dishonored, the holder notified by mail the last endorser, who lived in a different city, enclosing him at the same time two notices for delivery to the other endorsers, the last of whom resided in the same city with the holder of the note. These notices the endorser to whom they had been mailed immediately delivered to his next endorser, who, in turn, mailed, on the next day, to the first endorser, the notice intended for him.

Held, Sufficient to fix the liability of the first endorser.
2. The rule laid down in *Morton vs. Cammack, Mac A. & Mackey, 22*, that where the holder and endorser reside in the same city, notice of protest by mail is not sufficient, does not apply to a case where there are several endorsers some of whom live in another city.

STATEMENT OF THE CASE.

This action is brought upon a promissory note against the makers, (a partnership), Booth, Wemple & Smith, and also against one of the endorsers, Henry P. Gilbert, the appellant in this case. The drawers of the note interposed no defence; the endorser, however, insists that he is not liable upon the ground that due and proper notice of the presentment and dishonor of the note was not given him, and the legal sufficiency of the notice claimed to have been given, to charge the endorser, was the matter submitted to the court.

From the bill of exceptions and case stated, these facts appear:

1. That the Citizens' National Bank of Washington D. C., was the holder of the note from and after the 12th at least the 13th day of June, 1882.

2. The note matured on the 16th of July, 1882; adding the days of grace, was positively payable on the 19th July, 1882.

3. That the endorser, Gilbert, was well acquainted with the Citizens' National Bank and its officers, and they with him, and that he was a hardware merchant, had been in business for nineteen years in Washington, and had often done business with that bank.

4. That on the 21st of July, 1882, the National Farm and Planters' Bank of Baltimore, Maryland, received from the Citizens' Bank, in a letter dated July 20, 1882, the note, together with notices of protest, for itself, the plaintiffs, and for defendant Gilbert.

5. That on the 21st of July, 1882, the Baltimore bank notified the plaintiffs and enclosed the notice for the other endorser (Gilbert) to them: that Blundon, one of the plaintiff's firm, on the same day enclosed the notice to the defendant, Gilbert, with a letter from himself in his own name, and this notice and letter were received by the defendant in his morning mail on the 22d of July, 1882.

6. That the endorser, Gilbert, received no other notice of the dishonor of the note than the letter from Blundon of the 21st of July, and the notice enclosed therein.

This was substantially the testimony given in the case.

Whereupon the defendant prayed the court to instruct the jury:

1. That if the jury find from the whole evidence that the Citizens' National Bank of Washington was the party to whom the note in suit was sent for demand and payment, and that it thereby became and was the real holder of said note, giving and receiving notices in regard thereto; and if the jury shall further find that the said Citizens' National Bank was located and doing business in Washington, and defer

ant, Gilbert, was also, and had been for a long time previously a resident of, and doing business in the same place, and this was known to said bank, and that no other notice of dishonor of said note in suit was sent to the defendant than the one mailed from Baltimore, Md., on the 21st of July, 1882, then their verdict should be for the defendant.

2. That a notice of non-payment of a note, where the holder and endorser reside, and do business in the same locality or place, must be given to the endorser personally, or left at his place of abode or place of business, at least on the day after the dishonor of said note, to bind the endorser.

3. That notice of non-payment of a note to the endorser when parties reside in the same town or place, is not sufficient to bind him when sent by mail.

The court refused to grant these prayers, but instructed the jury that upon the whole evidence, the defendant, Gilbert, was liable, and their verdict was so rendered.

BIRNEY & BIRNEY for plaintiff.

FRED W. JONES for defendant Gilbert.

It is submitted: 1st. That a want of proper notice is a complete defence on the part of an endorser; the doctrine which formerly obtained that he must be injured for want of notice having been exploded. *Hill vs. Heap*, 16 Eng. C. L. R., 435.

2d. That the Citizens' National Bank of Washington, D. C., being the real holder of the note before and at the date of its maturity, was the only proper party to give notice of the dishonor of the note to all endorsers. *Worden vs. Nourse*, 36 Vt., 756; *Warren vs. Gilman*, 5 Shepley, 360; *Bank vs. Perkins*, 7 Shepley, 292; *Troy Bank vs. Capital Bank*, 41 Barb.; *Ogden vs. Dobbins*, 2 Hall, 112; *Bank vs. Fellows*, 2 Foster (28 N. H.), 302; *Smedes vs. Bank*, 20 Johns., 379; *Thompson vs. Bank*, 3 Hill, S. C. (law), 77; *Id.*, 1 Riley, S. C. (law), 81; *Ib.*, 23 Am. Dec., 354.

3d. That where the holder and endorser both reside or do business in the same place, to bind or charge the endorser, notice must be given to him personally, or left at his place

of abode, or place of business, at least or latest, on the day after dishonor of said note; and notice by mail is not sufficient to charge such endorser. *Cabot Bank vs. Warner*, 10 Allen, 522; *Green vs. Darling*, 3 Shepley, 143; *Morton vs. Ward*, 7 Wash. L. R., and authorities there cited; *Baile vs. Bank of Mo.*, 7 Mo., 467; *Kramer vs. McDarell*, 8 Watt & Serg., 138; *Stephenson vs. Primrose*, 8 Porter, 155; *Curtis vs. Bank*, 6 Blackf., 302; *Pierce vs. Pindar*, 5 Metc., 352; *Power vs. Mitchell*, 7 Wis., 161; *Norris vs. Bank*, 10 Mich. 547; *Bell vs. Bank*, 7 Gill, 216; *Walters vs. Brown*, 15 Md. 285; *Miranda vs. Bank*, 6 La., 740.

The note was born in Washington—its maker and payee (the endorser Gilbert) lived and did business in Washington—it was made payable at a bank in Washington, and at its maturity, and for some weeks before, the note was held in Washington.

The Citizens' Bank and its notary partially construed the law applicable to the case, and interpreted their duties under it. The notice given, itself, advises the endorser, Gilbert, that he is accountable to the "Citizens' National Bank" for the said note, and the notary certifies that the demand at protest was made by him at the request of the "Citizens' National Bank."

But should a note like the one in this suit be taken by an endorsee to a distant place, for instance, San Francisco, California, or London, England, and there discounted or deposited for collection, would it be, or can it be, held that the payee and first endorser would or could be charged upon notice from the bank here transmitted to such distant place but directed to such endorser, and then re-transmitted to the endorser at the same place?

It is obvious that the instructions prayed for embodied and stated the law of the case, and of this court, and should have been granted and given to the jury, and that the court below erred in refusing to give said instructions. It is equally obvious that the instructions given by the court below wrongly stated the law of the case, and, therefore, that as to the defendant Gilbert, who is sued in this action

jointly with the makers of the note, the judgment should be vacated and set aside.

Mr. Justice MAC ARTHUR delivered the opinion of the court.

In this case the declaration is upon a promissory note. The first endorser is the payee. It is dated July 16, 1881, payable in 12 months at the Bank of the Republic in this city. Gilbert endorsed the note to Edmonston & Sons, a co-partnership doing business in Baltimore. They placed it, as the period of maturity was approaching, in the National Farmers and Planters' Bank of the city of Baltimore. That bank endorsed it to the Citizens' National Bank of this city for collection.

We have, then, three endorsers: Gilbert, the payee; Edmonston & Sons, and then the National Farmers and Planters' Bank. The note was presented at the Bank of the Republic, and payment refused. It was protested, and notices were enclosed in a communication to the National Farmers and Planters' Bank of Baltimore. The notices of protest appear to have been sufficient to fix the liability of all the endorsers, provided they were properly delivered. The bank in Baltimore delivered the notices to their immediate endorsers, Edmonston & Sons, who, in their turn, transmitted the notice to Gilbert, at his residence in Washington. So that we have the three endorsers notified, each giving his immediate endorser notice the same day or the day after receiving it.

There can be no fault found with this method of notifying the endorsers, for it appears to be well established as law that the holder may give notice of the dishonor of commercial paper to his immediate endorser, and that one can then give notice to the previous one, and so on through the series of endorsers up to the first, and they, then, all become liable to the holder of the note. If, however, the holder sees fit to give notice only to his immediate endorser he takes that responsibility. If they communicate the notice in time to the antecedent endorsers, it fixes the liability of each

and all of them to the holder, although he may have communicated the notice only to his immediate endorser. Now we think that that was done in this case, and consequently that the liability of the first endorser is established. It is said that the notices ought to have been served by the Citizens' National Bank upon Gilbert directly. This bank has its habitat in Washington, where Gilbert also resides; the general rule is that where the holder and the endorser of a dishonored note live in the same city, service by mail is not sufficient—that it must be made either at his residence or place of business. This rule has been recognized by decision of this court in a case where there was but a single endorser, *Morton vs. Cammack, Mac A. & Mackey*, 22. But the law approves the method pursued in this case where there are several endorsers, so that the application of the decision of this court in a case where there was but one endorser can scarcely be applied to a case of this description.

It is said that the notice which was received by the first endorser, who is the defendant, apprised him that he was accountable to the Citizens' National Bank of Washington and it is claimed upon this ground that the notice ought to have been served upon him directly by the bank in this city. But the notice was transmitted properly by the bank here to the bank in Baltimore; the bank in Baltimore delivered the notice which had been enclosed for the second endorser, the plaintiffs in this action, and they, in turn, immediately communicated the notice that was designed for Gilbert, the first endorser, by mail, apprising him of the fact that the note had been returned to them dishonored, and that they wanted him to pay it, or language to that effect. We do not know that they could have done anything more to fasten the liability of the defendant Gilbert.

We are of opinion that the motion for a new trial upon the bill of exceptions should be denied.

OLIVIA BELMONT

vs.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY.

{ Decided January 19, 1885.
{ The CHIEF JUSTICE and Justices MAC ARTHUR and JAMES sitting.

LAW. No. 22,388.

An agreement of the parties by their attorneys to refer a pending cause to a special referee, "whose award, when approved by the court, is to be its judgment," is not within the Maryland act, and if the court disapprove the award, and make an order setting it aside, such order is not appealable.

MOTION to dismiss an appeal.

THE CASE is stated in the opinion.

S. S. HENKLE and C. MAURICE SMITH for plaintiff.

ENOCH TOTTEN and WM. A. MCKENNEY for defendant.

Mr. Justice MAC ARTHUR delivered the opinion of the court.

In the case of Olivia Belmont vs. the Washington and Georgetown Railroad Company, I am authorized to announce the conclusion of the court.

The following minute is taken from the journal of the court; "By agreement of parties, by their respective attorneys, the case is referred to James G. Payne, esq., whose award, when approved by the court, is to be its judgment."

No order of reference was prepared by the attorneys, and we suppose they made their oral application, and the clerk caught the decision of the court as well as he could and made this minute of it; but we cannot find that any formal order was signed by the court.

Mr. Payne, it appears, acted upon the order, took testimony and made an award, in which the facts that he found established by the testimony are stated at large with his conclusions of law. A motion was made to enter judgment upon this award. Exceptions were then filed by the plaintiff, against whom the award was rendered, in which the finding of facts as well as conclusions of law are disputed. The judge holding the circuit denied the motion to enter

judgment, sustained the exceptions to the award and set it aside. From that order an appeal is taken to this court, and it is now before us on motion to dismiss that appeal, on ground that the order was not appealable.

It is to be observed in the construction of this min that the award is to be subject to the approval of the court before it becomes its judgment. The limitation, therefore imposed by the order itself is that the judgment, in the creation of the court, is to be expressed by way of approval before it can become the final determination of the case. If it had been a reference to arbitration under the rule of the court, or under the Maryland act which authorized reference to arbitration, the effect of the award would have been entirely different from the one contemplated by this order. We can only consider this order as authorizing the referee to report the case to the court for its judgment, and as in the nature of a special verdict or an agreed statement of facts. This appears also to have been the construction put upon it by the referee himself, for he reports at large and in great minuteness the facts established by the testimony and the conclusions of law which he thinks ought to be applied to them, so that the court might see the whole case and approve or disapprove of his award. The court has exercised that discretion, and held that it must be set aside.

Now it may be that the attorneys intended to make a reference to arbitration. We know very well what the effect of an award of arbitrators is; that it is final and conclusive upon all the facts in the case, and the controversy cannot be inquired into either by the parties or by the court. If the duty of the court is a merely formal act then, or nearly so, to enter judgment upon the award. And that makes an award of an arbitrator a practical determination of the controversy. The only way in which the award of arbitrators can be impeached, according to the act of Maryland, is on the ground of fraud, malpractice, or where no award has not been served upon the parties, etc., and if a party desires to file exceptions it must be done with proper description in order to impeach it, otherwise the o

must stand and this appears to be the result of our own **rules** upon the subject. We provide that where a copy of **the award** has been served upon the party the court must **find judgment** upon it.

This is a mere reference to a special referee subject to **the approval** of the court. We think the order upon the **award** was entirely within the discretion of the court and **its judgment** upon it is not appealable.

We have been referred, however, to a former case, precisely **like** the present, which was determined the other way, and **the attorney** who argued in favor of the appeal, stated that **he** acted in this case upon the authority of that former **decision**. We can only say that none of the judges have any **recollection** of that point being raised in that or any other **case**. It does appear that the minute of reference was **precisely** like the one in the present case; and that the court **did** enter upon an examination into the merits, and **reversed** the order made below. It does not appear that this **point was made**. It is, therefore, one of those vague, floating **authorities** which exist in the traditions of the Bar, and which can scarcely have foundation in a well-considered and deliberate judgment upon a point clearly presented for **adjudication**.

The opinion of the court is that the motion to dismiss the **appeal** must be allowed.

THE CENTRAL NATIONAL BANK ET AL.

vs.

ANNIE G. HUME ET AL.

{ Decided December 19, 1884.

{ The CHIEF JUSTICE and Justices MAC ARTHUR and JAMES sit
EQUITY. Nos. 7,906, 8,011, 8,012 and 8,013, consolidated.

1. In a proceeding in equity an administrator, where acting in behalf of creditors, may attack a transaction of his decedent as fraudulent.
2. The claims of creditors upon the proceeds of a life insurance policy, taken out by an insolvent creditor for the benefit of his wife and children, extend only to the premiums paid by him since the date of his insolvency; and this deduction the beneficiaries are entitled to the remainder.

STATEMENT OF THE CASE.

These cases were consolidated by the order of the court.
The following are the facts:

Thomas L. Hume, deceased, procured four policies of insurance on his life, as follows:

1872, April 23, from the Life Insurance Company of Virginia for.....	\$10,
1880, March 28, from the Hartford Life and Annuity Insurance Company of Hartford, Connecticut, for.....	5,
1881, February 17, from the Maryland Life Insurance Company of Baltimore for.....	10,
1881, June 13, from the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, for.....	10,
<hr/>	
A total of.....	\$35,

The proceeds of the policy in the Hartford Annuity were directed to be paid to his wife; and of the Virginia Company to his wife and children jointly. The policies in Connecticut Mutual and the Maryland companies were taken out by him in the name of his wife; the proceeds of the former are made payable to his wife and children jointly, and of the latter to his wife, making \$20,000 payable to his wife.

and children, and \$15,000 to the wife alone. He died on the 23d of October, 1881, utterly insolvent, and R. Ross Perry and Reginald Fendall were appointed by this court his administrators. The debts due by his estate exceeded \$100,000, and the assets which came to the hands of the administrators were about \$6,000.

He is shown to have been hopelessly insolvent, when the last three policies were procured, and the greatest portion of the creditors against his estate (including the parties complainant in these suits) were existing creditors at that time. He was also insolvent when the first mentioned policy was issued, but it did not appear that there was any creditor of his estate who was such at the date of this policy, or earlier than the year 1874, about two years after it was issued.

The bill in the first cause was filed by a creditor in behalf of itself and others, no administration having been taken out, the other bills were filed by the administrators. The purpose of all of the bills was the same, viz., to recover the proceeds of these four insurance policies for the benefit of creditors.

All of the premiums on the different policies were paid by the decedent, and all of the contracts of insurance were made by him.

In the answer of the widow it was claimed that the premiums were paid by her deceased husband out of money belonging to the estate of her father, or out of money belonging to the separate estate of her mother, applied as directed and requested by her mother, and that but for the amount due by her husband to the estate of her father, she would now be possessed of a much larger estate than is represented by these policies of insurance.

W. D. DAVIDGE and EDWARDS & BARNARD for the administrators and creditors.

One of the positions taken in the brief of the defendants is, that the administrators cannot sue in equity to recover the proceeds of the policies so as to apply such proceeds to the claims of creditors.

It is urged that the transfers and contracts for the benefit of the wife and the children are good as between parties and privies, and can only be avoided at the instance of creditors.

But even if it be assumed that the case is presented of a complete assignment valid as between parties and privies, still the administrators represent the creditors. It is manifest that the sums in controversy are wholly insufficient to pay creditors, and that, in consequence, the principle that a voluntary assignment is good between parties and privies is in no manner involved. These proceedings, it will be observed, are in equity, and they involve only the right of the administrator to sue for the specific purpose of paying the creditors. Thus the whole question is whether, in a court of equity, executors or administrators may assert the right of creditors.

That for such purpose they represent the creditors, is beyond dispute. *Hagan vs. Walker*, 14 How., 34.

In that case the question was not whether the administrator *might*, but whether he must sue, as to allow creditors to sue might embarrass the administration. It was held that on the special grounds, which then existed, the creditors might sue; but the right of the administrator, in that case to sue, is distinctly maintained, and the court carefully distinguishes between a suit by an administrator at law and in equity to set aside a voluntary conveyance, by reason of the insufficiency of law machinery to confine the recovery to creditors, as may readily be done in equity proceedings. That case distinctly asserts that executors or administrators are, in equity, the representatives of creditors for the purpose of setting aside, for the benefit of the latter, fraudulent assignments, and goes farther, inasmuch as it maintains the doctrine that creditors undertaking to sue, must show special grounds therefor.

In a suit at law in this District, brought by the executor or administrator, he could recover, if at all, by virtue of his legal title, and representing as well the next of kin as creditors, he would hold the fruits of recovery for all entitled, and hence it has been held that he cannot sue at law, but

cause to allow him to sue at law, might enable the next of kin to avoid an assignment good as between parties and privies.

When, however, even in a court of law, the capacity of the executor or administrator as representing creditors can be distinguished from his other capacity as representing the next of kin, there is no sort of objection to his maintaining a suit in the former capacity. Take, for instance, a case like the present, where all the property conveyed is required to pay creditors, and when, in consequence, the fraudulent transfer must be set aside in *toto*.

In brief, at law, the whole difficulty encountered is the result of the double character of the administrator or executor. He represents the next of kin and he also represents the creditors. In the former character he may not assail a fraudulent transfer, in the latter he may, and the machinery of a law court may not readily, or even at all, allow the right as representative of creditors to be enforced. But whatever difficulty may exist at law there is none in a court of equity where accounts can be taken and the rights of the executor or administrator, as the representative of creditors, precisely determined and defined, and where his recovery can be confined to the exact measure of such rights.

An assignment, within the statute of 13 Eliz., ch. 5, is utterly void against creditors, and the property assigned is assets for the payment of debts. 3 Williams on Ex'rs, 7th ed., 6th Am. ed., 1781, marginal page 1679, and authorities cited; Shears vs. Rogers, 3 B. & Ad., 362; Skarf vs. Soulby, 1 Mac N. & G. Ch. Reps., 364.

An executor or administrator may, as the representative of creditors, assail in equity a fraudulent transfer. Holland vs. Cruft, 20 Pick., 321, cited and approved in Hagan vs. Walker; Welsh vs. Welsh, 105 Mass., 229; Chase vs. Reading, 13 Gray, 418; Caswell vs. Caswell, 28 Maine, 232; Gibbons vs. Peeler, 8 Pick., 253; McLane vs. Johnson, 43 Vt., 48.

And also at law. McLean vs. Weeks, 61 Maine, 277; Martin vs. Roots, 17 Mass., 222; Buechler vs. Gloninger, 2

Watts, 226; *Stewart vs. Kearney*, 6 Watts, 453; *Minor* rs.
Mead, 3 Conn., 289; *Andrews vs. Doolittle*, 11 Conn., 283.

The proceeds of these contracts of insurance belong to the creditors. The insolvency of the insured is clear. It is also clear that he paid the considerations for the different contracts. The moneys so paid belonged to his creditors. The sums in controversy are by convention with the insurers the equivalents or earnings of such considerations. Had he bought a farm or a ship on the same terms, that is, by periodical payments *during* his life, and the payments to cease at his death, the thing so bought would belong to creditors; as he could not give away property in specie, so he could not give away property in contract. He was bound to be just before he was generous. There is no difference between the proceeds of a contract of life insurance and the proceeds of any other contract. It is true that the considerations paid were small compared with the sums earned, but that is owing to the terms of the contracts, and the uncertainty of life. The validity of the contracts is not in question, but conceded, and had the insured, a young man, survived many years, the contracts obliged him to continue to make payments or forfeit the sums insured, so that the fact that he paid but a small amount is attributable solely to the accident of early death.

The decisions are uniform that the voluntary transfer of the proceeds of a contract of life insurance stands on the same footing as the voluntary transfer of any other contract or property, and is void in respect of creditors. *Bliss, Life Ins.*, §§ 323, 353; *May, Life Ins.*, 590; *Bump, Fraud. Conveyances*, 239; *Wait, Fraud. Conveyances*, § 24; *Pullis Robinson*, 73 Mo., 201; *Stokes vs. Coffey*, 8 Bush. (Ky.), 533; *Appeal of Elliott's Ex'rs*, 50 Pa., 75; *In re Anderson's Estate*, 85 Pa., 202; *Barry vs. Eq. L. Ins. Co.*, 59 N. Y., 593; *Rison vs. Wilkerson*, 3 Sneed (Tenn.), 568; *Hathaway Sherman*, 61 Maine, 475; *Catchings vs. Mangrove*, 39 Miss., 655; *Stokoe vs. Cowan*, 29 Beavan, 637; *Skarf vs. South*, 1 Mac N. & G. Ch. Reps., 364.

They are executory contracts; choses in action—

“Policies are choses in action, governed by the same principles applicable to other agreements involving pecuniary obligations.” Bliss on Life Ins., sec. 308; citing, *St. John vs. Am. Mut. L. Ins. Co.*, 2 Duer, 419; Same Case in 3 Kern., 31; *Palmer vs. Merrill*, 6 Cush., 282; *Ashley vs. Ashley*, 3 Simons, 149. See also, *Ins. Co. vs. Sears*, 109 Mass., 383; *Burton vs. Farinholt*, 86 N. C., 260; *Appeal of Elliott’s Ex’rs*, 50 Pa., 75; *Catchings vs. Manglove*, 39 Miss., 655.

The insured undertakes and agrees to pay during his life an annual uniform amount, in consideration of which the company or corporation undertakes to pay a fixed sum at his death to his legal representatives, or to his appointee, or beneficiary designated in the policy, or contract, as the case may be.

The annual premiums or payments agreed to be made are generally small compared with the amount to be paid at death of the insured; the agreements, are, nevertheless, mutual, based upon the expectancy or duration of the life of the insured, through well ascertained sources of information and experience.

“The contract, commonly called life insurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance, according to the probable duration of the life, and, when once fixed, it is constant and invariable.” May on Insurance, sec. 8.

The insured in the case under consideration was, comparatively, a young man; he was in his forty-second year when he took out the last three policies. When the first was procured, in 1872, he was only thirty-three years of age. He was of strong physique and in good health.

The expectancy of his life under the authority of the *Carlisle*, or other actuary tables of acknowledged merit and reliability, was as follows:

At the time he procured the first policy, thirty-two years. The other three, twenty-five years.

By the first contract his obligation under the expectancy stated was to pay \$230.80 annually during thirty-two years, an aggregate sum of \$7,385.60.

Under the provisions of the three last policies about \$8.00 more annually for twenty-five years, or an aggregate sum of \$20,000.

Making, under the terms of all the policies, his annual payments during his life about \$1,000, or \$27,000 in round numbers in all; which, with average interest, would yield the companies about \$48,000—some \$13,000 more than the amount stipulated to be paid by them.

The thing settled was the contract entered into by the husband, purchased by him and paid for with his own means when insolvent; and, being voluntary, is void as to existing creditors.

There is no difference, in principle, between the purchase and voluntary settlement by an insolvent of a life insurance policy, and the purchase and settlement of an annuity. In the latter the settlor purchases for a large sum a contract, or chose in action, which yields him annually, during the life of another, a smaller amount; and in the former he secures a contract, by the terms of which he is to pay a smaller sum annually during his own life in consideration of the payment to his beneficiaries of the larger amount at his death.

Annuities in the hands of volunteers, settled when the donor was insolvent, are liable to the demands of creditors, and can be recovered in equity. Wait on Fraud. Con., sec. 24; Norcutt vs. Dodd, 1 Craig & Ph., 100; Degraw vs. Glason, 11 Paige (N. Y.), 136.

Under the provisions and operation of the Statute of 13 Eliz., and the principles of the common law (of which this statute is merely declaratory), every description of property, in specie or contract, of value, corporeal and incorporeal, vested or contingent, in possession or expectancy, of an insolvent debtor, no matter how settled, or given, or appro-

priated to the use or benefit of, or acquired by, the voluntary donee, is liable to the claims of creditors, and can be reached and applied to satisfy their demands. Bump on Fraud. Con., pp. 238 to 244, and p. 532; Wait on Fraud. Con., sections 24 to 45; and authorities cited by both authors.

The doctrine contended for by defendant's counsel in their supplemental brief, that policies of life insurances, of the character under discussion, being *choses in action*, cannot be held to be included in the statute mentioned, under its most liberal interpretation, is not law, and is contrary to the whole current of authority as announced by the elementary writers, and by every court of last resort—except in one single instance in the State of Louisiana, where the civil law is in force—where the question has been presented for judicial determination.

The cases cited by defendant's counsel in their briefs (except the Louisiana case, and in which there is a strong dissenting opinion by the chief justice of the court) are not authorities to the contrary.

The concluding remarks of the court in the case of *Ellitt's Appeal*, 50 Pa., are *obiter dictum*.

In *Anderson's Appeal*, 85 Pa., 202, the case turned upon the provisions of a statute exempting the proceeds of policies from the claims of the creditors of insolvents, then in force, and has no application.

The case of *McCutcheon's Appeal*, 99 Pa., 133, also came before for consideration under the provisions of the same statute.

In *Pence's Admr., vs. Makepeace*, 65 Ind., 345, in which there was a similar statute as that in Pennsylvania was then in force, the court says:

"We need not and do not decide in this case, what effect, if any, the alleged insolvency of James T. Makepeace might possibly have upon the appellee's title to the policy of insurance or to the money derived therefrom; for that question was neither tried nor decided by the court below, in this case, nor is it presented by the record of this cause for our decision."

The court in the case of *Thompson vs. Cundiff*, 11 Bush.,

(Ky.) 569, decreed that the creditors should have the premiums paid during the husband's insolvency prior to the law of that State, passed March 12, 1870, (which was also similar to the Pennsylvania statute), on the theory that the policies "are contracts to be kept in force from year to year, at the will of the insured. The right to keep the policy alive by payment of the stipulated premiums, is a privilege secured to the insured by his agreements with the insurer. He may exercise or abandon this privilege at his discretion." (p. 573).

The court holding substantially that a liberal construction of the statute brought the policies in controversy in that case within its provisions. Moreover, the court found, as matter of fact, that the wife raised money herself to pay the premiums, on the pledge of jewelry given to her by her parents; that this jewelry was in pledge for that purpose, at the time of the death of her husband, for over \$400, and that she redeemed it out of the money paid to her by the insurance companies. It also appears that one of the policies for \$5,000 would have lapsed for the non-payment of a premium falling due a few days before the death of the insured, while he was insensible, except for the fact that a friend generously paid it, and prevented its forfeiture. Pp. 571 and 572.

The Louisiana case stands alone in denying the rights of creditors to recover the proceeds of life insurance policies taken out by an insolvent debtor. No case can be found where it has been decided that the premiums only can be reached by creditors.

The donor being insolvent the gifts of these contracts of insurance are necessarily void.

The theory of the law is that the voluntary donee holds the property as a trustee for the creditors to the extent of their demands. Bump on Fraud. Con., p. 241, and authorities cited.

In equity the *cestuis que trust* are the real owners.

The thing given or settled is what the donee holds as such trustee, and the recovery, so far as the creditors are con-

cerned, is that thing or its proceeds, not what it cost the fraudulent donor, or the price he paid for or expended on it.

Any other doctrine would be absurd, and would, if established, make fraud, in many instances, quite profitable, and, it is submitted, that there is no authority in the books to the contrary.

To illustrate—

The insolvent debtor secures a valuable patent at the nominal expense or fee prescribed by the Patent Office and takes out the patent in the name of his wife to cheat his creditors; will it be contended that the trust in the wife as to the creditors, created by the law, extends only to the money actually paid to secure the patent, and not to the patent itself; or, if sold and the proceeds invested in other property (no matter how valuable, or how great the profit through the change), that the same trust does not attach to the property thus acquired? The same may be said of book royalties, trade-marks, seats in stock exchanges, lottery tickets, stock margins, growing crops, powers of appointment, and the like.

The trust being established, the law gives to the creditor (the beneficiary) the full benefit of the property or contract, and equity will compel the trustee to account for the proceeds realized, however great, which were produced by the means of the donor, however small.

It is a familiar rule of equity that a trustee shall not profit by his trust.

Upon principle, and upon consideration of public policy, the recovery by creditors should not be limited to the premiums alone, but, to the extent of their debts, to the proceeds realized, or thing held by the involuntary donor acquired through the means of their insolvent debtor.

ENOCH TOTTEN and GORDON & GORDON for defendants:

The administrators of an intestate's estate are estopped from assailing a contract or transaction made by the intestate in the same manner as he himself would be if living,

and they can in no emergency charge fraud as against **his** acts.

There is a statute of Maryland in force in this District on this subject as follows:

"*Provided always*, That nothing in this act shall extend or be construed to extend to make void any such sale, mortgage or gift against such seller, mortgagor or donor, his executors, administrators or assigns, or any claiming under him, her or them." (Act of Md., 1729, Chap. 8, Sec. 6).

The Court of Appeals of Maryland, in *Dorsey vs. Smithson*, (6 H. & J., 61), held that the statute of 1729, above referred to, did not make void contracts, by that act condemned, so far as the contractor, his executors, administrators and assigns, and those claiming under them, were concerned, and declared that it was so, too, at the common law. That case was replevin, and it was held that the executor could not defend on the ground of fraud even though he was himself a creditor. This was affirmed in *Allien vs. Sharp*, (7 G. & J., 96). See also *Goodrich, Adm'r, vs. Treat*, (3 Colo., 408); *Bump on Fraud. Con.*, 444, (note), 3d Ed.; *Davis vs. Swanson*, 54 Ala., 277; *Kinnemon, Admr. vs. Miller*, 2 Md. Ch., 407; *Choteau vs. Jones*, 11 Ill., 310; *Catherine Tierney vs. Corbett*, 2 Mackey, 264.

In *Crossfield, Admr. vs. Edwards, Admr.*, (G. T., July 1883), Cox. J., speaking for the court, said: "In no case can an administrator sue for the benefit of creditors." See also *Relief Association vs. McAuley*, 2 Mackey, 70.

Every case relied upon by counsel for the complainant on this point is founded upon a statute, except the case *Hagan vs. Walker*, (14 How., 34), and that case involved such question. It arose in Alabama, and the law there firmly established the other way. (See 54 Alabama, 277).

This being the rule established in Alabama by the State courts, the Supreme Court of the United States will inflexibly follow those decisions. *Christy vs. Pridgeon*, 4 Wall., 196; *Leffingwell vs. Warren*, 2 Black., 603; *Shelly vs. Gay*, 11 Wheat., 367; *League vs. Egery*, 24 How., 266.

The wife may be a creditor, and is included in the design-

nation "and others" in the statute of 13 Eliz., ch. 5. *Finley vs. Finley*, 7 Md., 537; *Dimmick vs. Dimmick*, 3 Md. Ch. Dec., 140; Alex. Br. Stat. [note], 404; *Rider vs. Kidder*, 10 Ves., 360; *Woodworth vs. Sweet*, 51 N. Y., 9; *Syracuse Co. vs. Wing*, 85 N. Y., 421; 51 N. Y., 626; *Bishop on M. W.*, sec. 119; *Hyde vs. Powell*, 47 Mich., 156.

As to the position of the wife as "creditor" of her husband, because he has used her funds for his own purposes, see *In re Wood*, 5 Fed. Rep., 443; *In re Corse*, 2 Fed. Reporter; *Glidden vs. Taylor*, 16 Ohio St., 509; *Oliver vs. Moon*, 26 Ohio St., 298; *Kaufman vs. Whitney*, 50 Miss., 103; *Story's Eq.*, 1373; *Wells' Sep. Estate*, § 172; *Crum vs. Barkdall*, 10 Md. L. Rec., No. 6.

Under our "married woman's" act the wife may deal with her husband. *Sykes vs. Chadwick*, 18 Wall., 141.

The husband may allow his wife to retain her separate personal property, and if he borrows her money, or uses it for his own purposes, there is a valid consideration in equity to repay it. A promise to repay money so borrowed or appropriated by the husband cannot be regarded as *nudum pactum*. (*Woodworth vs. Sweet*, 51 N. Y., 9, and cases there cited; *Syracuse Co. vs. Wing*, 85 N. Y., 421.) In the case last cited, Wing received \$1,366.00 from the guardian of his wife in 1844, money inherited by her from her father's estate. The married woman's act of New York became a law in 1848. This money was relied upon for the consideration to uphold, as against creditors, a mortgage made in 1878. The testimony showed that the husband and wife subsequently had conversations in reference to this money, to the effect that "the money was her's, and that she should have it." The court sustained the mortgage and said, "if the money was received by the husband as his wife's, or to be accounted for or secured to her, he waiving his marital rights thereto, she had an equitable right to the fund, sufficient to sustain the mortgage, which he subsequently gave to secure it, and the mere lapse of time would not invalidate the security. Citing 51 N. Y., 9, 395; 24 N. Y., 623; 51 N. Y., 626; 1 *Bishop on M. W.*, sec. 119. The Supreme Court of Michi-

gan recently placed a wife in the attitude of a creditor, her husband having used her money to buy real estate, the title to which he took in his own name, and upheld a conveyance, as against creditors, made by the husband for her repayment. *Hyde vs. Powell*, 47 Mich., 156; and see *Harvey vs. Alexander*, 1 Rand., 219.

The foregoing doctrines relating to the rights of a married woman, as against creditors, in a case where her estate had been used by her husband, has recently been asserted with much force by the Supreme Court of the United States in the case of *Hitz vs. National Met. Bank*, 110 U. S.

A debtor may lawfully prefer one creditor over others. *Glenn vs. Grover*, 3d Md., 212; Alex. Br. Stat., 381.

Subsequent creditors cannot complain of a fraudulent conveyance. See *Kipp vs. Hanna*, 2 Bland, 26; Alex. Br. Stats., 402; *Wood vs. Hollins*, 14 Md., 158; *Crozier vs. Young*, 3 B. Mon., 158; *Roberts on Fraud. Con.*, 463; *Crooke Car.*, 550; *Graham vs. La Crosse R. R. Co.*, 102 U. S., 148.

The proceeds of a policy of insurance issued on the life of a husband payable to the wife, or to the widow and children, cannot constitute a fund for the payment of the deceased husband's creditors. To devote such a fund to this purpose is contrary to public policy, and would be equivalent to a mortgage upon human life. *Warnock vs. Davis*, 104 U. S., 775; *Page vs. Burnstine*, 102 U. S., 664; 26 La. Ann., 326; *Cammack vs. Lewis*, 15 Wall., 648; *Baker vs. Union Mutual*, 43 N. Y., 283.

In a case in Louisiana, the court says:

"A husband has the right, we think, to insure his life in the interest of his wife and children as well as in the interest of his creditors, and his obligation to provide for them in case of his death is certainly well recognized. If the policy issues to the wife, or is properly transferred to her, the amount stipulated therein belongs to her when the event insured against happens, and she cannot be forced to inventory it as part of her husband's estate. * * * It is the wife whom the husband seeks to protect, when he insures his life in her behalf; otherwise he would not insure

her name. He has no need to protect his creditors by any mode, for they can protect themselves. A creditor may have the life of his debtor insured, even without the consent of his debtor." Succession of Hearing, 26 La. Ann.,

In Elliott's Appeal (50 Pa. St., 75), it was held that policies of insurance effected without fraud directly and on their face for the benefit of the wife, and payable to her, are not to be held fraudulent as to creditors. The court declares with emphasis, that "*such policies are not fraudulent as to creditors.*" See also Thompson vs. Cundiff, 11 Bush, 569; McClellan's Adm'r vs. Makepeace, 65 Ind., 345.

Where fraud is charged against a conveyance, proof must be shown that both parties are guilty of fraud; fraudulent knowledge and intent of one is not sufficient. Prevost vs. Ligon, 103 U. S., 22.

A policy of insurance on the life of a husband, issued upon the application of the wife was made payable to the wife for her sole use and in case of her death before her husband's to be paid to her children. She died before her husband, leaving children. After her death the husband procured another policy and took out another for the same amount in his own name, and for his own sole benefit, the new policy being upon the same premium and dated back as to be of the same date with the other. After paying one year's premium in the new policy, the husband died intestate. Held, that in equity the substituted policy belonged to the children, and that they and not the creditors of the husband were entitled to the insurance money. Chapin and others vs. Fellowes, Administrator, 36 Conn., 132.

These contracts are by their terms, either directly, or by implication, to be executed at the places where the companies are severally located, and hence are governed by the regulations contained in each, and by the special State statutes relating to life insurance policies.

The certificates of the Hartford Life and Annuity Insurance Company are payable to Mrs. Hume, "at the home of said company," within ninety days after the receipt

by the company of the "proofs" of death and "upon presentation and surrender of" the certificates. Upon receipt of proofs of death, the president of the company is required "to make an assessment for as many dollars as there shall be similar certificates" outstanding "on the holders thereof." See, also, the contract of trust with the security company. This "assessment" is to be made in Connecticut and not here.

The fourth section of the act amending the charter of the said Hartford Life and Annuity Company provides as follows:

"Said company may issue policies for the benefit of an [redacted] payable to any married woman or child or children; and any contract of insurance thus issued, by whomsoever the same may have been procured, shall be, to the extent expressed in the policy, the sole and separate estate of the married woman, child or children, to whom the policy, [redacted] its terms, may be payable. And the discharge of such policies by such married woman or her assigns, or by such children (or the guardians of minors), shall be a valid discharge of the same."

A like provision in the charter of a company in Kentucky was held (in a case relied upon by the complainants) to exempt the proceeds of a policy from the claims of creditors. *Thompson vs. Cundiff*, 11 Bush, 567.

The Connecticut Mutual Life Policy provides for its payment, and also the premiums, "at the office of this company in Hartford, Conn.," in ninety days.

It also contains this provision, to wit:

"It is agreed that this policy is issued and delivered at Hartford, in the State of Connecticut, and is to be in all respects construed and determined in accordance with the laws of that State."

The policy issued by the Maryland Life Insurance Company and the premiums are made payable at the office "in Baltimore."

These contracts are made in reference to the laws of Connecticut and Maryland, and are to be executed there. The

subject of insurance did live in the District of Columbia; but it does not follow that the subject of a life policy shall always continue to reside at one place. It therefore cannot be said that the policy had reference to the laws of the District of Columbia, any more than to the laws of any other place to which the subject might emigrate. *Norton vs. Pritchard*, 106 U. S., 129; *Gallaudet vs. Sykes*, 1 Mac A., 489; *Railroad Company vs. Bartlett*, 14 Gray, 214; *Cooley on Con. Lim.*, sec. 285; *Gebhart vs. Railroad Company*, 109 U. S., 527; *Spratley vs. Insurance Company*, 11 Bush, 443.

A policy of life insurance issued upon the life of a husband and payable, by its terms, to the wife, or to the wife and children, cannot be held to be included in the designated property mentioned in chapter 5 of 13 Elizabeth, and classified as "lands, tenements, hereditaments, goods and chattels," nor a *chose in action*, under the most liberal interpretation of that statute, as it is in force in this District. That statute is as follows:

"Be it therefore declared, ordained and enacted by the authority of this present Parliament, that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements and hereditaments, goods and chattels, or any of them, or of any lease, rent, common or other profit or shares out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise; and all and every bond, suit, judgment and execution, at any time had or made, either since the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful covinous, or fraudulent devices and practices, as is aforesaid, are, shall or might be in any wise disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrated, and of no effect, any pretence,

colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding." *Alex. Br. Stat.*, 278.

The interest which the wife has in her husband's life, is in no sense property. It is not tangible, and cannot be reached by any process known to the law.

Story, in his work on Equity Jurisprudence, declares the law, as applicable to this statute (13 Eliz., ch. 5), to be as follows:

"The English doctrine upon this subject, after various discussions, has at length settled down in favor of the former proposition, namely, that in order to make a voluntary conveyance void as to creditors, either existing or subsequent, it is indispensable that it should transfer property, which would be liable to be taken in execution for the payment of debts. The reasoning by which this doctrine is established is, in substance, that the statute of 13 Elizabeth did not intend to enlarge the remedies of creditors, or to subject any property to execution, which was not already, in law or equity, subject to the rights of creditors. That a voluntary conveyance of property not so subject, could not be injurious to creditors, nor within the purview of the statute, because it would not withdraw any fund from their power which the law had not already withdrawn from it. And that would be a strange anomaly, to declare that to be a fraud upon creditors which, in no respect, varied their rights or remedies. Hence, it has been decided that a voluntary settlement of stock, or of choses in action, or of copyholds, or of any other property, not liable to execution, is good, whatever may be the state and condition of the party as to debts."

1 Story's Eq., § 367.

Subsequently this doctrine was denied in the well known case of *Bayard vs. Hoffman* (4 John. Ch., 452). This denial called forth from Judge Story the following language, which was appended to the section above quoted (See 1 Story's Eq., § 368, note):

"Whatever may be the true doctrine on this subject, a distinction may, perhaps, exist between cases, where a party

indebted actually converts his existing tangible property into stock to defraud creditors, and cases where he becomes possessed of stock without indebtedment at the time; or, if indebted, without having obtained it by the conversion of any other tangible property. Where tangible property is converted into stock to defraud existing creditors, there may be solid ground to follow the fund, however altered."

"The contract of life insurance is a contract of indemnity, and nothing more, and it contains a promise to pay a sum certain on the happening of some specified future event. The policy is not the contract, but only the evidence of it. *Glantz vs. Gloecker*, 104 Ill., 573; *Succession of Hearing*, 26 La. Ann., 326.

The premium constitutes no part of the policy, and does not belong to, or constitute any part of the money payable on the happening of the event, any more than does the consideration paid to a guarantor who agrees to stand for the debt of another form a part of the debt which he is called upon to pay on default of the person against whose default he warranted. *Succession of Hearing*, 26 La. Ann., 326; *Pence vs. Makepeace*, 65 Ind., 345; *Glanz vs. Gloecker*, 104 Ill., 573.

For the same reason the surrender value of a life policy is wholly separate and distinct from the fund which may become payable upon the death of the assured.

These propositions being found to be true, what property, goods, chattels or choses in action were fraudulently transferred when the husband in this case paid \$242 for the premium on the Maryland policy and received the policy?

If any chose in action, goods or chattels passed, to whom did they pass? Did the assured transfer anything to his wife, and, if so, what? She received no money; the company received the premium.

It is submitted that in no case can the creditors reach anything beyond the premiums, as was partially permitted in *Thompson vs. Cundiff* 11 Bush, 567, and that in this case they can recover nothing.

All the cases relied upon by the complainants to uphold

the contrary of this doctrine last stated, are cases arising upon statutes, except the case from Missouri.

A case arising on an assignment to the wife of a perfected policy, issued to and payable on its face to the husband, can have no application here. Such a policy has a surrender value, and perhaps may be called property or a chose in action, and it possibly may be reached by creditors.

Mr. Justice MAC ARTHUR delivered the opinion of the court.

In the case of the Central National Bank of Washington against Hume, with which case three others are consolidated, the court has instructed me to announce its decision.

The suits are against four different insurance companies, and the object is to subject the proceeds of the policies to the payment of creditors and to include them among the assets of the deceased intestate.

There are two or three preliminary questions which were discussed at some length during the hearing, and which can be disposed of without much observation. One relates to the parties. The Central National Bank, it appears, was the owner of three notes, perhaps four, and it is said all of these notes have been secured, and all of them have been paid but one, and that is secured by endorsement, and that, therefore, the Central National Bank cannot maintain a pure creditor's bill where it holds security for its indebtedness. It was also argued that an administrator is estopped from attacking the transactions of his intestate as fraudulent.

Another point which was argued in this connection, relates to the consolidation of the suits, and a motion was made to rescind the order consolidating them, because the defendant alleges that he is injured by that order, and that it was passed without his consent, and in his absence. The court have come to the conclusion, without discussing those points, to decide them all against the defendant and in favor of the plaintiffs.

The policies involved in this suit were issued by the Life Insurance Company of Virginia, on the 23d of April, 1872,

for \$10,000; by the Maryland Life Insurance Company, on February 17, 1881, for \$10,000; by the Connecticut Mutual Life Insurance Company, June 9, 1881, for \$10,000, and by the Hartford Life Annuity Company for \$5,000. Two of these instruments were made in the name of Mrs. Hume, and all were made for her benefit and payable to her.

The ground upon which the complainant proceeds is that Mr. Hume, at the time these policies were effected, was insolvent; that the premiums were paid out of his means, and that they, therefore, insured to the benefit of the creditors, and came under the provision of 13th Elizabeth, which is the law of this District.

It is argued that a policy of insurance is a chose in action, and when issued to the husband belongs to his estate; and that it makes no difference as to creditors whether it is taken in his own name or that of his wife so long as he paid the premiums thereon. Numerous cases are cited to show that it is assignable and transferable like any other piece of property, and if transferred when insolvent, for the purpose of hindering, defrauding or delaying his creditors, it was subject precisely to the same course as any other property which he might have transferred for the same purpose.

The broad assertion that a policy of insurance upon which premiums have been paid is a chose in action, is to be taken with a good deal of limitation. Judges and courts have spoken of them commonly and generally as choses in action like bonds and promissory notes, going to his administrator and assignable in the market during his life time. This is scarcely so in an unlimited sense. A promissory note represents an existing indebtedness. A bond does the same. A policy of insurance does not and cannot until the death of the assured party takes place.

The Supreme Court of the United States have recently decided that a policy of insurance cannot be assigned to any one not having an insurable interest in the life of the assured. The Supreme Court of the State of New York have decided that a policy of insurance effected for the benefit of the wife, is not assignable at all, holding under their statute

that allows a husband to insure his life for the benefit of his wife and children free and clear from the claims of his creditors, that it would be against public policy to allow a wife to traffic in that which was consecrated to the benefit of the family.

Many of the States, indeed most all of them, have enacted laws by which a husband can assure his life for the benefit of his family free and clear from all liability to his creditors; and I have no doubt that upon a proper construction of these statutes, the States where they have been passed will ultimately arrive at the same conclusion reached by the Court of Appeals of the State of New York. And the tendency of the decision in the Supreme Court of the United States, judging from the one to which I have just referred, is in that same direction.

So that we see a policy of insurance has many disabilities that do not belong to choses in action generally, and that it is the tendency of legislation, as well as of judicial construction, to invest it more and more with those attributes that will give it the effect it was intended to subserve, to wit, the protection and settlement of families.

I have stated that the policies here were effected for the benefit of the wife, and two of them made directly in her own name. What is the effect upon a policy of that description growing out of the fact that the husband at the time he undertakes to make the provision is in embarrassed circumstances? That is the main question before us.

As I have stated, many cases have been referred to which establish the doctrine, that when the husband effects the policy in his own name, it goes to the benefit of his creditors, and it is sought to apply that principle to this case. But Mrs. Hume did not derive anything by assignment, nothing by transfer. What she claims under this policy never belonged to the estate of her husband, never formed an asset or a basis of credit. The proceeds of the policies stand entirely in a different relation to his estate from a contract directly with himself; he never had any control of them; he never could assign or transfer them. The decisions are

to the uniform conclusion that the moment a policy of insurance is effected for the benefit of a wife upon the life of her husband, it becomes her property *eo nomine*, and nobody has control of it but herself. She may assign it, unless there is some public policy against it, and it is just as much a vested right in the married woman as any other portion of her separate estate.

Can the fact that her husband paid the premiums deprive her of this vested right without any act on her part to forfeit it?

It is not pretended that Mrs. Hume was aware of her husband's insolvency, or that he intended to hinder and delay his creditors. She stands in the position of a perfectly innocent person, unaffected by anything corrupting the contract of insurance.

There is a decision in Kentucky, that of *Stokes & Son v. Kolbe*, 8 Bush, 534, where three policies of insurance were effected in the name of a married woman. With regard to one of them, the court came to the conclusion that it was an assignment in point of fact, although in her name, and gave the proceeds to the creditors of the husband who was insolvent.

With regard to another, they allowed the wife to take the money because it did not clearly appear that the husband was insolvent when he paid the premiums. But with regard to the smallest of the three, the court held that inasmuch as the husband had taken it out and paid the premiums himself, it stood the same as if it had been taken out in his own name, and they allowed the creditors to assert their claim to the proceeds of the policy.

But the effect of that decision is entirely neutralized by the fact that the same court, four years afterwards, in the case of *Thompson vs. Cundiff*, 11 Bush, 569, declared exactly the opposite doctrine. That was where an insolvent husband took out two policies of insurance in the name of his wife, and the court held that, in the absence of fraud on the part of both the husband and the wife, the interest in the policies vested in the wife as her sole and separate property,

notwithstanding the fact that her husband was insolvent at the time he effected them, and, to use their own words, they doubtfully gave the creditors the benefit of the premiums which he had paid during the period of his insolvency, together with interest thereon, which amount they charged on the widow.

It is a curious fact that wherever it has been claimed that an insolvent debtor can do nothing for the protection of his family, the State legislatures have stepped in immediately and enacted laws to the effect that a policy can be effected for the benefit of a married woman free and clear of any claim of her husband's creditors. In some of the States the amount of the premiums is left at large, but in others they have put limitations on the premiums, beyond which an insolvent husband cannot insure his life for his family. In Kentucky when the supreme court announced this obnoxious doctrine, they passed a law of that description, and that law was passed during the interval between the two cases which I have just alluded to; and the fact that the law is referred to by the court in the last case, who say that they do not mean to determine that a policy void as to creditors at the time it was effected, is protected at all by the State law, and so they proceed to decide the case upon principles applicable at common law, and hold the doctrine which I have last announced.

So far as Kentucky is concerned we have her last voice, and probably it will be the last as her legislation has ended all dispute on that subject.

At an early day the Supreme Court of Pennsylvania had this same point before them in *Elliott's Appeal*, 50 Penn., p. 75. There a husband had effected a policy in his own name, and assigned it to his wife when he was insolvent, and the court held that the assignment was void and the creditors had the benefit of the policies. In closing that opinion, however, the court made a distinction, and they say:

"We are to be understood, in thus deciding this case, that we do not mean to extend it to policies effected without fraud directly and on their face for the benefit of the wife

d payable to her. Such policies are not fraudulent as to editors, and are not touched by this decision."

The legislature in Pennsylvania, seeing that there might be uncertainty on this question, interposed within two years and passed one of the acts to which I have just referred, and they declare that a policy taken in the name and for the benefit of a married woman is free and clear from all claims of all creditors of her husband.

Two cases in Pennsylvania follow that in which that statute was recognized, but in which they give effect to the letter in Elliott's Appeal, and in speaking of it they adopt it as a true exposition of the doctrines laid down so far as to policies for the benefit of the wife are concerned.

In the case of Pentz, administrator, against Makepeace, Indiana, 315, the first clause of the syllabus reads:

"An insurance policy issued upon the life of a husband for the benefit of his wife, is her property, and an effectual assignment and delivery thereof to another during the lifetime of the husband, can be made only by her."

And in the opinion they hold the following language:

"If, however, it were conceded (which we do not concede) that the creditors of the assured might in any case institute and maintain an action for the recovery of any part of the amount of a policy of insurance procured by an insolvent debtor upon his own life, for the benefit of his wife or family, upon the ground that the premiums therefor were paid with money which ought to have been applied to the payment of the debts of the assured to such creditors, and that such payment of such premiums by the assured was a fraud upon the rights of such creditors, we are clearly of the opinion that to the very utmost which the creditors could possibly recover in such action would be the aggregate amount of the premiums thus paid. The creditor could not, in any event, derive a profit from, or recover on, more than the sums of money actually paid by the debtor in premiums upon a policy of insurance upon his own life payable to or for the benefit of his wife or any member of his family."

And such appears to be the whole current, both judicial and legislative, on this subject.

We are disposed to apply that doctrine to this case. A considerable number of authorities were read upon the argument as to the sacredness of the claims of creditors, and as to the injustice of depriving them of the benefit of the property of their debtors, and such observations were undoubtedly justified by the cases in which they were pronounced. In fact, we are all very familiar with the general strength of language in which the relation is discussed which exists between the creditor and the debtor. Many other relations however, are equally important; the relations which a man bears to his wife and to his family, for instance. We do not, I am very sorry to say, generally find the courts so emphatic in regard to the latter species of relations as to the former. Perhaps that results from the fact that courts are more generally engaged in adjudicating pecuniary rights than those of a social character. But the rights which result from the family relations are certainly quite equal to those which result from debtor and creditor. You might blot out every law and extinguish every right for the collection of debts, and the community would scarcely feel the shock. But if you abrogated the law of marriage and its relations, you would not only rupture the moral, but also the physical organization of society. Where, therefore the two claims come in conflict, the courts should adjudicate between them with justice and fairness to both.

When a man has made provision for his wife, the law recognizes that he has performed a social and moral duty. The state has a deep interest in having families of healthy children properly educated and settled in life, as well as to have creditors paid what is due, and whatever will promote that object should receive its due share of attention.

These remarks are made more especially because we can distinguish here between the rights of the creditors and the rights of the family, and do justice to both of them. What right have the creditors to what never belonged to the estate? What right have they to a vested right in a man's

ried woman for her protection and that of her family? What right have they to a species of property that never existed until after the death of the husband? We presume that no creditor of Thomas L. Hume would dare to stand up and make the statement that he had been misled by these policies, or that he had extended credit to him on their strength.

So that it strikes the court very forcibly that where we can protect a settlement on a family, by giving back to the creditors all that has been taken from them, we are doing justice and equity to all, and the creditors have a right to demand no more.

There are some considerations which lead to and justify this conclusion. It appears that Mrs. Hume, at the time she became the wife of Mr. Hume, was the daughter of a man of considerable means, Mr. Pickrell, owning an estate near the city; that she is an only child, and that after the marriage Mr. Hume and his family lived mostly at that estate, scot free, unless he contributed from his grocery establishment something to his support. In fact the whole family lived there as if he had been born into it. Mr. Pickrell, and after his death, Mrs. Pickrell and Mrs. Hume, placed in him the most unreserved confidence. Mr. Pickrell endorsed for him, and, after his death, Mr. Hume became his administrator; whatever he collected out of the estate for the benefit of Mrs. Pickrell, went into his business.

I know it is said that Mr. Hume was guilty of dishonesty, if not crime. But it is to be remembered that he was not a wasteful man, that he did not dissipate his time, that he appears to have been devoted to his business, and that if he took anything, either from the estate of Mr. Pickrell or from anybody else, it was for the benefit of that business, and he did all he could to keep up the sinking ship.

Having these relations with the family, and having encroached somewhat, I will not say how extensively, upon the patrimony of the wife, I think without going very far we can find a proper motive that he had in effecting these insurances for his wife and family, and we do not think it is

we should say that his insolvency is not established at an **earlier** date than 1874; and from that time onward to the **point** of his death, Mr. Hume was undoubtedly unable to **meet** the claims of his creditors, and that from that time **he** had no right in law to take from his means any **prop-**
erty for the benefit of his family, as a settlement. But **we** **can** give the creditors every just right, every dollar they are **entitled** to, and give the widow and the children the benefit **of** the contract which was made for them; and we have no **more** right to transfer the proceeds of these policies to the **cred-**
itors than we would have to take Mrs. Hume's interest **in** Tunlaw for the same purpose.

The money has been paid into court. The decree must **be** entered decreeing the money to Mrs. Hume, and **charg-**
ing her with the amount of all the premiums that were paid **upon** the three policies from February, 1874, which is **the** proper time to adopt as the period when Mr. Hume's **insolvency** clearly appears.

DISTRICT OF COLUMBIA, USE OF FANNIE A. COOPER,

vs.

JOHN T. VAN HORN.

AT LAW. No. 23,577.

{ Decided January 12, 1885.

{ The CHIEF JUSTICE and Justices MAC ARTHUR and JAMES sittin_____ g

The bonds of constables given under and in pursuance of the act of Congress of June 7, 1878, is not affected or controlled by the act of March 3, 1863, requiring the renewal of constables' bonds every two years. The bond given under the act of 1878 runs during the term of the constable, to wit, four years. While under the act of 1863, the bond runs indefinitely until renewed or until the officer was removed.

STATEMENT OF THE CASE.

This was an action against the sureties upon the official bond of one James A. Bean, lately one of the constables of this District. Bean was appointed July 3, 1878; his bond was approved July 5, 1878. Section 1037 of the Revised Statutes District of Columbia, act of March 3, 1863, provides "that each constable shall renew his bond on the thirtieth day of June in every alternate year of his continuance in office."

On the 7th day of August, 1880, Bean wrongfully, as it is alleged, levied on certain household goods of the real plaintiff in this action.

At the trial, the original bond was produced and the signatures admitted, but when the plaintiff's counsel offered to read it in evidence it was objected to on the ground that under the act of Congress of 1863, the sureties were not liable for the acts of Bean after the 30th day of June, 1880. This objection was sustained, and a verdict for defendant directed by the court. The correctness of this ruling was the only point for review before the General Term.

P. B. STILSON for plaintiff:

The act of 1878 appoints the constables for four years and this court, in pursuance thereof, July 1, 1878, requires them to give a bond, in the penalty of \$5,000, for the faith

ful performance of their duties "during their continuance in office." This is the form and amount of the bond in this case.

The act of Congress, under which the old constables acted, fixed no limit to their term of service, but required them to renew their bond on the last day of June in each alternate year.

The act of 1878 expressly repeals all laws and parts of laws inconsistent with its provisions. The act of 1863, which appoints constables generally, and requires them to renew their bonds on the 30th day of June in each alternate year, is clearly inconsistent with the act of 1878, which appoints a constable for four years, and requires him to give a bond during his continuance in office, and it is consequently repealed by section 6 of the act of 1878.

This bond is valid as a common law obligation; if irregular in form or not renewed at the proper time, it is no fault of the plaintiff, as the plaintiff could do nothing in the premises. The renewal if required or not done was the result of the laches of the constable and defendants, and they cannot avail themselves of their own laches. 12 Wendell, 306; 2 Id., 281; 5 Id., 193; 3 Id., 414; 14 Johns., 401; 4 Cranch, 90.

HINE & THOMAS for defendants:

Section 1037 of the Revised Statutes of the District of Columbia provides that, "each constable shall renew his bond on the 30th day of June in every alternate year of his continuance in office." The ruling of the court below was in accordance with this statute and should be sustained.

Mr. Chief Justice CARTER delivered the opinion of the court.

This action is brought upon the bond of a constable for default in office in his official duties as a constable. The grievance charged against him post dates the bond by two years and two months, and it is claimed that his sureties are not liable, because the bond is *functus officio*. This is a bond co-eval with the entrance of the constable upon the

discharge of his duties as such, covering all of his official undertakings during the entire period of his existence as a constable. Its condition is that he will discharge all of his official duties of constable for the term of his appointment, and pay over all moneys that may come into his hands.

The defence is, that this bond expired in the midst of his term, and only fixes responsibility on the part of his sureties for his acts and omissions, his nonfeasance and malfeasance before the expiration of the two years that mark the middle of his term. This point was sustained by the court below, who determined that no cause of action could arise upon the bond after the expiration of two years, and instructed the jury to return a verdict for the defendant.

This bond, the form of which has been devised by this court, is created and required by the act of Congress of the 7th of June, 1878, which provides as follows: "The Supreme Court of the District of Columbia shall have authority to appoint not exceeding twenty constables, who shall hold office for four years, subject to be removed by said court for cause, upon hearing, and said constables shall be the successors of the constables now holding office in said District. The time of office of all constables now in office in said District shall end on the 30th day of —, after the approval hereof, and they shall, on or before said day, return all processes which may be held by them, duly executed, and pay over to the proper parties all money in their hands. All said constables may duly execute and return all writs and processes in their hands at the time of the expiration thereof. The Supreme Court of the District of Columbia shall have the power to fix the amount and form of the bonds, and approve the same, to be given by said justices of the peace and constables, and make such further regulations as may be necessary to complete the transfer of the existing offices," etc.

In pursuance of this act, we provided a bond, the condition of which reads as follows:

"Whereas, the above-named constable hath been duly appointed to the office as constable in and for the District of

Columbia; now the conditions of the above obligation is such that if the above bounden constable do and shall faithfully perform the duties of the said office, and do and shall pay over, on demand, to the person entitled or authorized to receive the same, all moneys that may come into his hands as a constable, during his continuance in office, then the above obligation to be void, otherwise it is to be and remain in full force and virtue."

That is the condition of the bond that this court prescribed to be executed by constables and their sureties for the term of four years—the term prescribed by the law for the existence of the constable. Constables in this jurisdiction had an indefinite existence before this law was passed. The memory of man did not run back to the beginning of their appointment, and it was for the purpose of rendering a definite and responsible constabulary in the District that this statute was enacted, and this bond prescribed by the court. Its terms are that he shall be responsible for all his official acts during the period of his official existence, viz., the four years for which he is appointed.

Now, it is said that this bond expires in all its energy in the middle of his term, and that no breach can transpire after the expiration of the first two years of the four. And this is said to be so, because as far back as in 1863 Congress passed a law providing that each constable should renew his bond in every alternate year of his continuance in office. It was a provision of the law for the increase of responsibility on the part of constables, a guarantee to those whose business they were transacting that they should furnish security for fidelity in the performance of their duty, and it was enacted when the terms of the constabulary were indefinite. Suppose it be said that this statute applies to the constables created by the act of 1878, what then? We have a bond executed in 1878 by a constable, with sureties, to answer for the discharge of his official duties. Now, if the act of 1863 applies, one of his official duties is to furnish a renewal of his sureties at the expiration of two years. Who is responsible for his failure? What good defence do the

sureties on this bond have, if the constable is derelict in or of his most important duties?

The act of March 3, 1863, is merely declaratory of the duty of a constable, in the interest of higher and better security, and neither he nor his sureties can say that his default or dereliction is a discharge for the surety.

But our judgment is not founded upon that view of the subject. Our opinion is that the act of 1863 is a director statute merely. The bonds which were given at the time this statute was enacted, requiring their renewal every two years, were co-extensive with the office, covering its entire length and all its duties, and it remained an obligation concurrently with the continuance of the office. And the fact of the renewal, or non-renewal, did not enter into their validity. But when the term is restricted by law to four years and a bond is given covering the four years, it cannot be said that it is of no validity after the expiration of two years. The statute of 1863 has no application to it, for this bond is for a definite period, while in the other case the bonds run indefinitely until renewed or until the officer was removed.

The judgment is reversed and a new trial granted.

THE UNITED STATES vs. BENJAMIN F. BIGELOW.

CRIMINAL DOCKET. No. 14,394.

{ Decided December 29, 1884.

{ The CHIEF JUSTICE and Justices MAC ARTHUR and JAMES SILL.



1. The courts of the United States are invested with power to determine conclusively in the trial of a criminal cause; when the interests of public justice require that the jury shall be discharged, and such a discharge is not in any sense equivalent to a verdict of acquittal, or a defence against a further trial upon the same or a new indictment.
2. But this discretionary power to discharge the jury during the course of a criminal trial is not to be understood as containing the slightest element of arbitrary choice. The discretion is one which the trial justice must use under a solemn obligation to satisfy his judgment that such a course is required by the interests of justice.
3. Fourteen indictments were found against the defendant for embezzlement, to each of which he pleaded not guilty. Afterwards, at his instance, they were all consolidated and directed to be tried as one case. A jury was then impanelled and sworn, and the district attorney opened the case to the jury, stating what he expected to prove in relation to each and all of the indictments. After he had closed, and before any evidence was taken, the presiding justice, on his own motion and against the protest of the defendant, rescinded the order consolidating the indictments, discharged the jury and directed the district attorney to select one of the indictments for trial, which was done, and the same jury resworn. Whereupon the defendant pleaded *autrefois acquit* which was overruled on demurrer and the trial proceeded with, and a verdict of guilty found. On appeal to the General Term it was held that this discharge of the jury was not equivalent to an acquittal, and was no defence to the second trial.

THE CASE is stated in the opinion.

A. S. WORTHINGTON and H. T. TAGGART for the United States.

W. M. A. COOK and ROBERT CHRISTY for defendant.

Mr. Justice JAMES delivered the opinion of the court.

This cause was heard at the last term, but, on motion of defendant, a rehearing was granted, to be confined, according to his own suggestion, to the constitutional question supposed to be raised by the bills of exception.

The record shows that on November 14th, 1882, thirteen indictments were filed against the defendant, under the act

of February 4, 1878 (20 Stat., 23), and one indictment under section 5209 of the Revised Statutes of the United States. Section two of the act of February 4, 1878, provides: "That if any officer, clerk, agent or employee in the service of any person, firm, association or corporation shall, within the District of Columbia, embezzle or wrongfully convert to his own use, or fraudulently take, make way with, or secretly with intent to embezzle or fraudulently convert to his own use, or shall knowingly and wilfully or wrongfully sell or dispose of any money * * * belonging to such person, firm, association or corporation which shall come into his possession or under his care by virtue of such office, clerkship, agency or employment, he shall, on conviction thereof, be *punished by a fine not exceeding five thousand dollars or by imprisonment not exceeding five years, or both.*" Section 5209 of the Revised Statutes relates to National Banks and provides that: "Every president, director, cashier, teller, clerk or agent of any association, who embezzles, abstracts or wilfully misapplies any of the moneys, funds or credits of the association, * * * or who makes any false entry in any book, report or statement of the association, with intent in either case, to injure or defraud the association, * * * shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

By these indictments the defendant was charged with embezzling the moneys of the National Bank of the United States, of Washington, and to each he pleaded "not guilty." Afterwards, on his instance, the fourteen indictments were consolidated. The first bill of exceptions shows that on the issues thus made, a jury was empanelled and sworn on November 5, 1883; that after the Assistant United States District Attorney had opened the cases and stated in what the United States expected and proposed to prove in relation to each and all of the indictments, and after the court had taken a recess of half an hour and reassembled, the presiding justice stated that the opening had surprised him, and that it would take a long time to try the cases, and that the attorney for defendant "insisted that the c

should go on and be tried on the issues made up;" that the court, on its own motion, ordered that the order of consolidation should be rescinded and the jury discharged, and that the United States should select one of the cases for trial, which was done; that the court required that the jury be resworn, and the trial proceeded with; which was done on the indictment selected, which was No. 14,394.

The second bill of exceptions shows that after these proceedings were had, namely, on the next day, the defendant, by leave of the court, filed a special plea, without withdrawing his plea of "not guilty." This plea, after setting forth the discharge of the jury, states that the court, against the objection and exception of defendant, "re-empanelled and reswore the jury to try again the same cause of action, to wit, one of the said indictments, and proceeded to try the same; * * * and said trial is now in progress, without any other or further plea having been made to the same by said defendant, than that interposed thereto by said defendant prior to said consolidation of the several indictments." It concludes as follows: "Wherefore, the said defendant says that he has been put on his trial a second time for the same offence, hereby alleging and showing that the trial now in progress is for the same identical offence as that from the consideration whereof the said jury was discharged as aforesaid. Wherefore, the said defendant prays that he may have this his plea of former acquittal, and of being twice put in jeopardy for the same offence, considered and allowed by the court, and placed on the files and entered as of record in said court, as a plea of *autrefois acquit* and former jeopardy "to the said indictment consolidated as aforesaid." To this plea the United States demurred, and the demurrer was sustained; the trial proceeded and resulted in a verdict of "guilty." The defendant filed and submitted a motion for a new trial, and in arrest of judgment, upon grounds set forth in forty-six separate specifications. The ground stated in the last of these was, "because the court had overruled the plea of the defendant of former jeopardy." At the former hearing of this cause, we held

that none of the other grounds was sufficient to sustain the motion, and we are still satisfied with that conclusion. The overruling of the plea of former jeopardy and *autrefois acquit* is therefore the only ground for the motion in arrest which remains to be considered.

The proposition which the defendant intended to present by his special plea and motion in arrest, was, that he was put in jeopardy immediately upon the swearing of the jury to try the consolidated indictments, and without the introduction of any evidence against him; and that, when the jury was discharged, and then resworn to try one of the indictments included in the consolidation, he was twice put in jeopardy for the same offence, in the sense of the Fifth Amendment of the Constitution of the United States, which declares that no person shall "be subject, for the same offence, to be twice put in jeopardy of life or limb."

The same or an equivalent provision is contained in the constitutions of most of the States, and its meaning has been interpreted as well by the State as the United States courts. Two very different methods of treating the language of the provision have been used, and conflicting conclusions have been reached. Under one method, some courts have interpreted the words literally, notwithstanding they have declined to apply the same treatment to the rest of the phrase, "of life or limb;" emphasis has been laid by them on the particular word "jeopardy," and they have devoted their attention to ascertaining when the first jeopardy begins. Their conclusion has been that, when the jury is sworn, the prisoner has reached the jeopardy from the repetition of which the constitutional rule protects him. Under the other method, the whole phrase, "twice in jeopardy of life or limb," has been treated as a technical expression, adopted from the common law; and the constitutional prohibition has been interpreted, on that ground, to mean only that no person shall be subject, for the same offence, to be tried twice. In its application the first of these interpretations includes the other, but it goes further. It holds, of course, that a person has been once in jeopardy, in the sense of the

stitution, when he has been tried, and either acquitted or convicted; but it holds also that he has, in the sense of the same rule, been in jeopardy when certain proceedings have been had, which have not reached actual acquittal or conviction; and it fixes upon the swearing of the jury as a proceeding. This interpretation, and the manner in which it has been maintained and applied, suggest some observations before we consider the weight of authorities on the subject. We propose to inquire whether it is maintainable on principle.

It is clear that the ground on which it asserts that jeopardy exists as soon as the jury is sworn must be, that there is then at once jeopardy of *an adverse verdict*; and it would appear how jeopardy of such a verdict can lawfully exist before evidence has been introduced. What is the position of the jury, under our practice, at that stage of the proceedings; and what would it be even if the old formality of charge by the clerk were added after the oath? The processes of impaneling and swearing them have only the effect to organize and qualify the tribunal by which the prisoner is to be tried, and the charge had only the effect to inform them of the nature of the duty they were to perform in that trial. In either case they are only *ready* for the performance of their functions; but they have not thereby begun their actual performance. Jeopardy that they may suffer an adverse verdict cannot well exist before they have exercised the power to consider whether to give such a verdict, whether any fact leads toward it; and, both by the common law, and under the express provisions of our Constitution, they have no such power before any proof is presented to their consideration. So much was imported even by the original charge, which recognized the limitations of their power, while it informed them of their duty. They were told by it what they were to inquire of, and the last words were: "Hear your evidence." In effect, they were informed that their inquiry was to be, whether *the evidence proved* the prisoner to be guilty, and their power was to find him guilty or not upon such an inquiry. But the prohibitions of the

common law bore directly on this point. As we learn ever from Magna Charta, the common law secures the accused from being deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land; and this, as Coke explained in 2 Ins., 50, 51, means due process of law, in which is included "presentment or indictment and being brought in to *answer thereto*;" and this, as Mr. Justice Curtis said in *Greene vs. Briggs*, 1 Curtis C. C., 326 includes the consequent right to be discharged unless the charge is *proved*. These rules of the common law not only forbid conviction without proof, but forbid any consideration of conviction until proof is presented. At this stage of the proceedings, the law says, in effect, to the jury: "You are now informed of your functions, and are sworn to perform them faithfully; when the 'inquiry' begins, you will begin to consider its steps; until then, your function has not begun. But the protection afforded by our Constitution against the existence of jeopardy immediately upon the swearing of the jury, is still more complete. While the Fifth Amendment declares, as did the common law, that no person shall be deprived of life, liberty or property without due process of law, the Sixth provides that "in all criminal prosecutions the accused shall enjoy the right * * to be confronted with the witnesses against him," and "to have compulsory process for obtaining witnesses in his favor." The provision for confronting the witnesses who were to prove his guilt would, if it had stood alone, have imported that compulsory witnesses was an indispensable condition to an adverse verdict, when the charge is denied; and that no power was given to the jury to find such a verdict otherwise; but the provision for due process of law, which means here what meant at common law, is an express declaration that no person shall be deprived of life or liberty without proof; in other words, that without proof there *shall not be a verdict* against life or liberty. As we have already said, a rule which forbids an adverse verdict without proof, forbids also the consideration of the question whether there shall be such a verdict; and this inability to consider an adverse verdict

applies as well to the time before any proof is presented as to a total failure to present any proof. We hold, then, that there cannot at that time be any legal jeopardy of a verdict which the jury have at that time no power to consider.

We find this view, as to the time when the function of the jury begins, incidentally confirmed by the terms in which Blackstone lays down the rule as to discharging the jury, which has been so much relied on in all the cases which maintain this contention. He says: "When the evidence on both sides is closed, indeed *where any evidence hath been given*, the jury cannot be discharged (unless in cases of evident necessity) till they have given in their verdict." 4 Bl., 360. Brief as is this statement, it is clear that the principle which the commentator had in mind was, that the jury should not be interrupted in the performance of their function, unless in cases of necessity; and it is equally clear that in his opinion that function did not begin until some evidence was presented for their consideration.

But this contention has been rested on a particular proposition in which immediate power of deliberation has no part. It is claimed that when the jury are formally "charged with the prisoner," or, under our simpler practice, when they are only sworn, *the trial has thereby begun*; and the argument from this assertion seems to be, that, the trial being one entire proceeding, which may end in an adverse verdict, jeopardy of such a verdict exists from the beginning of that proceeding. In *McFadden vs. The Commonwealth*, 23 Penn. State Rep., 12, Black, C. J., said: "When does the trial begin? Not, properly, until the jury is charged with the prisoner. But the practice of formally charging the jury is not generally observed in the courts of this State, and we cannot refuse a party any of the rights which he would otherwise have, merely because a form is omitted by the public officers. We must, therefore, hold that the jury has the prisoner in charge when a full jury is impanelled and all the jurors are sworn." In effect, the court held that the trial is begun when the jury is sworn, and that thereupon the prisoner is in jeopardy. In reference to some other mat-

ters, and in a general sense, it may be exact enough to say that the trial has then begun; but here the particular question is, what is the position of the jury in reference to the beginning of the trial; and this question demands great precision. With the utmost respect for the high authorities who have used similar language, we are of opinion that, the sense of this question, it cannot be said that the trial has begun, either when the jury is sworn or when it is formally charged. When the Constitution provides, as the common law had done, that trial shall be by jury, it is unintelligible that the qualification of the jury for a trial should constitute in any sense a part of the process of trying what is to be done by them. A proceeding has begun, but not yet the jury's work, nor any of their powers. It is said, however, that the trial began with the charge, and that under our practice, the oath of the jury should have an equivalent effect. It is important, therefore, to consider whether there was actually anything in the formality of charging the jury which made it a part of the trial by the jury, or caused their relation to the trial to be different from what it was after they had merely been sworn. For this purpose it is necessary to state these formalities fully. First, the oath was administered in this form: "You shall well and truly try, and true deliverance make between our sovereign lord the king and the prisoner at the bar, whom you shall have in charge, and a true verdict give, according to the evidence," &c. Then, after the cryer's proclamation the clerk said to the jury: "Look upon the prisoner, you that are sworn, and hearken to his case. A B starved and indicted by the name of A B, &c. (reading the indictment) Upon this indictment he hath been arraigned; upon that arraignment he pleaded not guilty, and for his trial has put himself upon God and his country, which country you are; so that *your charge is to inquire* whether he be guilty of the felony whereof he stands indicted, or not guilty; you find him guilty, you shall inquire what lands, tenements, goods and chattels he had at the time of the felony committed, or at any time since; if you find him not guilty, the

you shall inquire if he did fly for it or not; if you find that he did fly for it, then you shall inquire what goods and chattels he had at the time he did fly for it, or at any time since; if you find him not guilty, and that he did not fly for it, say so and no more. Hear your evidence."

It is always said with great emphasis that by this formality the jury come to have the prisoner in charge, and a grim notion is suggested that he is necessarily in jeopardy until he escapes from their clutches. But the name by which text writers or judges describe a proceeding is not necessarily an analysis of its nature or effect, and we find nothing in this formula but definite information as to the work upon which the jury are about to enter, but upon which they have not yet entered. They now know what they have to try, but the trial yet lies before them. When "their evidence," in the language of the charge, begins, then their function begins, but not till then. Whether that function shall ever begin—in other words, whether it shall ever be in their power to consider the question of an adverse verdict—depends, not upon anything under their own control, but upon the happening of that next step, the introduction of evidence. It follows that the very existence of any jeopardy of an adverse verdict depends upon the happening of a condition precedent; and, therefore, that such jeopardy cannot be said to exist immediately upon either the swearing or the charging of the jury.

We have next to observe that the same courts which hold that jeopardy is reached when the jury is sworn, universally hold also that, under certain circumstances, the jury may be discharged and the accused put again on trial for the same offence, either upon a *venire de novo* or a new indictment. They are not in harmony as to the circumstances under which this may be done, but all of them agree that it may be done if the trial is interrupted by the illness of the judge, or a juror, or the prisoner. As to other causes of discharge there has been a conflict of opinion, but most of them now concede that the jury may be discharged, and another trial had, if it is properly shown that they could

not agree upon a verdict. But whatever the conceded ground of discharge may be, all of the courts which hold that jeopardy, in the sense of the Constitution, is reached when the jury is sworn, hold necessarily that, in a case of proper discharge, the prisoner had never been in jeopardy. If jeopardy does begin with the swearing of the jury, it is difficult to understand how a subsequent event, which merely prevented its final effect, shows that it never began. A solution of this obvious difficulty it has been suggested, however, that the cause of the discharge may be considered to have been an inherent defect from the beginning; that solution merely proposes to imagine what is not true, and we think that the two propositions are simply irreconcilable. Let us take, for example, the case of a discharge because the jury cannot agree upon a verdict. To say that jeopardy of life is reached when the jury is sworn, means as we have already said, that there is then jeopardy that the jury *may* agree upon a verdict against life; and it is impossible that it should be part of the same theory that there had been no jeopardy of such agreement, because they found themselves in the end unable to agree upon any verdict. If the jeopardy begins as alleged, it is an essential part of it that they may be *able to agree*, as well as that the agreement may be adverse. There are three things, as to this matter, which a jury may lawfully do: they may agree upon a verdict of conviction, they may agree upon a verdict of acquittal, or they may not agree upon a verdict at all; and if jeopardy begins as soon as they are sworn, then jeopardy must consist of the very fact that, of these three things, they *may* do the first, notwithstanding they may, on the other hand, do the last. How does the fact that, when they come to consider the evidence, they find themselves unable to agree at all, show that there never was any possibility that they might take a different view of that evidence, and find it conclusive of guilt? What has the actual result to do with the question whether there had been jeopardy that the jury might do otherwise? If the jeopardy referred to by the Constitution actually does exist as soon as the jur

sworn, it exists at the moment of their discharge, and the Constitution would forbid a further trial in these very excepted cases. But it is now as generally conceded by courts which hold this theory, as by those which deny it, that in all cases of proper discharge of the jury, including cases of disagreement, the constitutional rule permits a further trial; and this concession, as we think, simply discredits and surrenders the proposition that jeopardy, in the sense of the Constitution, is reached as soon as the jury is sworn.

Again, this proposition seems to be discredited, and even ignored, by the very form in which the defence of former jeopardy is stated in the authorities to which we refer. All of them stand upon the ground that an improper discharge of the jury is equivalent to *an acquittal*; and this is formulated as the constitutional reason why a further trial is forbidden. Now, this objection does not mean that the prisoner had been in former jeopardy by being merely put on trial, placed before a sworn jury; but that, in contemplation of law, he had been *tried* and consequently acquitted. The defence stands upon the prisoner's alleged *right to a verdict* in the first proceedings, on the principle that an unlawful denial of that right cannot affect the benefit which should accrue to the prisoner from its actual enjoyment. This mode of presenting the defence of former jeopardy implies that the true meaning of the constitutional prohibition is, that no person shall be subject to be twice *tried* for the same offence, and that the former jeopardy is the jeopardy incurred in passing through a complete trial. These implications appear very strikingly in a passage of Judge Cooley's Principles of Constitutional Law, pp. 296, 297, to which our attention was called on the part of the defendant. The learned author there says: "The Fifth Amendment forbids that any person shall be subject, for the same offence, to be twice put in jeopardy of life or limb. This is an old phrase which has come down from times when sanguinary punishments were common; but the meaning is that no person shall be put on trial a second time for the same offence, after he has been tried and convicted or acquitted. But

some explanation is necessary, since in some cases one may be entitled to the benefits of an acquittal though a verdict has never been returned." He then explains, as follows, how a case in which there has been no verdict may come within the constitutional rule thus interpreted: "A person is in jeopardy when he is put upon trial before a court of competent jurisdiction, upon an indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been empanelled and sworn to try him. The accused then becomes entitled to a verdict that shall forever protect him against any future prosecution, and a discharge of the jury without his consent is equivalent to an acquittal, except in a few cases in which a discharge without a verdict becomes a necessity." Notwithstanding his statement that "a person is in jeopardy when * * * a jury is empanelled and sworn to try him," the learned commentator distinctly rests the defence of former jeopardy upon the fact of former trial and verdict, or what he claims to be their legal equivalent. We trust we do not do injustice to his several propositions in saying that, when analyzed, they seem to contain a contradiction. When he says that the constitutional rule against being put "twice in jeopardy" means that the accused shall not be again put on trial after he has been already tried, and either convicted or acquitted, we understand him to say substantially that at a case of former jeopardy exists, in the sense of the Constitution, only when the accused has been tried, or may be said to have been tried. He then asserts, in explaining when the accused may be said to have been tried, that, in the sense of the same rule, a case of jeopardy, and therefore of former jeopardy, existed as soon as the accused was put on trial. It is for this reason that this jeopardy, as we understand him, that he deduces the prisoner's right to a verdict; then, having demonstrated this right, he claims that a denial of it is equivalent to an acquittal, and seems to conclude that now at last the case of former jeopardy, in the sense of the Constitution, exists. If it is to be arrived at in this way, it can hardly be said at the same time to have existed on the swearing of the jury.

whether the prisoner's right to insist upon a verdict does not depend upon the proposition that he is already in jeopardy, whether the denial of a verdict is, in the sense of the constitution, equivalent to a verdict of acquittal, remain to be considered in another place. For the present, we refer to the various and similar explanations of the ground on which a new trial is allowed after a discharge of the jury, only as indicating that they seem to concede practically that the true meaning of the constitutional prohibition is, that no person shall be subject to be tried again for the same offence, after he has been already *tried*; and that the former jeopardy—if distinct jeopardies are to be counted—is the jeopardy incurred in a complete trial; complete either in fact or in contemplation of law.

The proposition which we have examined has assumed, in the American cases, the burden of maintaining itself on principle, and we conceive that that burden properly belongs to the government.

We have, therefore, treated it as an original question, and are led to the conclusion that on principle the line that jeopardy is reached as soon as the jury are sworn, and without the introduction of evidence, is not maintainable. On the other hand, we are of opinion that the contrary interpretation of the constitutional rule, to which we have referred, is established by authorities by which we are bound.

The first interpretation of this clause of the Amendments was given by the legislature. Of course, the constitutional provision was meant to extend to persons in the land and naval service, as well as to other persons. This is necessarily true on broad principle, and is shown expressly to have been the intention of the Fifth Amendment by its context; for persons in those forces are specially excepted from one of its provisions, but from none of the others. Therefore, when Congress undertook to express one of these protections in the Constitution for the government of the army, it was their constitutional duty, and must have been their intention, to extend it completely and in its fullest measure. The form in which this particular protection under consideration was stated in

the 87th article, by the act of April 10th, 1806, was, the officer, soldier, &c., "shall be *tried* a second time for same offence." This enactment was the work of men were in public life when the Amendment was adopted who were cognizant of the discussions attending it. An almost contemporaneous interpretation of its meaning is therefore important; as is the further fact that this has stood unaltered from that time, for now nearly 100 years, as the unquestioned equivalent of the constitutional provision.

In 1820, the meaning of this clause was considered by the Supreme Court of New York in the *People vs. Goodwin*, Johns. Rep., 188. We find the following passage in the opinion of the court: "The question, then, recurs, what is the meaning of the rule that no person shall be subject to the same offence, to be twice put in jeopardy of life or limb? Upon the fullest consideration which I have been able to bestow on the subject, I am satisfied that it means no more than this: that no man shall be twice tried for the same offence. * * * Much stress has been placed upon the fact that the defendant was in jeopardy during the time the jury were deliberating; it is true that his situation was critical; and there was, as regards him, danger that the jury might agree on a verdict, but in a legal sense he was not in jeopardy, so that it would exonerate him from another trial. He has not been tried for the offence imputed to him. To render the trial complete and perfect, there should have been a verdict either for or against him. In a legal sense, therefore, a defendant is not once put in jeopardy until a verdict of the jury is rendered for or against him, and if rendered for or against him, he can never be drawn in question again for the same offence." This case is referred to, not on the ground of its superior authority to the decisions of other courts, but on account of reference to and approval of later decisions of United States courts. Three years afterwards, Mr. Justice Washington, sitting in the Circuit Court for Pennsylvania, in the case of *United States vs. Haslam*, 4 Wash. Cir. Ct. Rep., 402, considered a plea similar to

presented in the case before us. For the present, we shall cite only that part of the opinion which relates to the meaning of the Fifth Amendment. "It is contended," said the court, "that, although the court may discharge in cases of misdemeanor, they have no such authority in capital cases; and the Fifth Amendment to the Constitution of the United States is relied upon as justifying the distinction. We think otherwise; because we are clearly of opinion that the *jeopardy* spoken of in this article can be interpreted to mean nothing short of the acquittal or conviction of the prisoner; and the judgment of the court thereupon. This was the meaning affixed to the expression by the common law, notwithstanding some loose expressions to be found in some elementary treatises, or in the opinions of some judges, which would seem to intimate a different opinion. Upon this subject, we concur in the opinion expressed by the Supreme Court of New York in Goodwin's case, although the opinion of the Supreme Court of this State in Cook's case is otherwise. We are, in short, of opinion, that the moment it is admitted that in cases of necessity the court is authorized to discharge the jury, the whole argument for applying this article of the Constitution to a discharge of the jury before conviction and judgment is abandoned, because the exception of necessity is not to be found in any part of the Constitution; and I should consider this court as stepping beyond its duty in interpolating it into that instrument, if the article of the Constitution is applicable to a case of this kind. We admit the exception, but we do it because that article does not apply to a jeopardy short of conviction."

A few months later, at the February Term, 1824, the question whether a prisoner could again be put on trial for a capital offence after the jury had been discharged because they were unable to agree, came before the Supreme Court of the United States, upon certificate of division, in the case of *United States vs. Perez*, 9 Wheat., 579. It is to be remembered, in estimating the meaning and force of this case, that Mr. Justice Washington sat in it; it is probable that he understood the brief opinion delivered by Mr. Jus-

Justice Story to come up fully to his own emphatic view of the question. The court said in Perez's case: "We are of opinion that the facts constitute no legal bar to a future trial. *The prisoner has not been convicted or acquitted, and may again be put upon his defence.*" As Mr. Justice Story himself remarked, in the later case of *United States v. Gilbert*, 2 Sumner, 56, "the court did not go into any exposition of the clause of the Constitution now under consideration; but simply stated that in the case of Perez, the prisoner had not been convicted or acquitted, and therefore might again be put upon his defence." Notwithstanding the absence of exposition, this simple statement of the reasons why the prisoner might again be put on trial, seems to be a most effective declaration of the test of the liability of a prisoner to be put again on trial was, whether he had been convicted or acquitted already. The question whether a discharge of a jury might amount to an acquittal, was not touched by this part of the opinion. That question remains to be considered in its proper place; but the important point at present is that the Supreme Court, by applying the test of former acquittal or conviction, recognized the same interpretation of this clause of the Constitution which has so recently been given by one of its members. And no doubt as to what Mr. Justice Story understood himself to have said or meant by his opinion, would seem to be settled by his statement of the law on this subject afterwards in his work on the Constitution. It is to be observed that the first edition of this treatise appeared in 1833, only nine years after the decision of Perez's case, and was dedicated to Chief Justice Marshall, who also sat in that case. He must have understood himself to state their common opinion. In section 1787 of the Commentaries, he said of this clause "The meaning of it is, that a party shall not be tried a second time for the same offence after he has once been convicted or acquitted of the offence charged by the verdict of a jury, and a judgment has passed thereon for or against him. But it does not mean that he shall not be tried for the offence a second time if the jury have been discharged witho

giving a verdict; or if, having given a verdict, judgment has been arrested upon it, or a new trial has been granted in his favor; for in such a case his life or limb cannot judicially be said to have been put in jeopardy." We are aware that, in the later case of *United States vs. Gilbert*, 2 Sumner, 19, where he held that this clause forbade a new trial after conviction, even at the prisoner's instance—a decision which is not followed—Judge Story impaired by some observations the authority of his treatise. He dissented emphatically from Judge Washington's opinion as to the necessity of a judgment as well as a verdict, in order to bring a case within this provision, but we do not understand him to depart from the main proposition of his text, that the meaning of this clause is, that a person shall not be subject to be tried again, after having been once tried. Whatever may be said, however, of Judge Story's later views, we have ourselves no doubt about the effect of the decision in *Perez's* case. When the court gave, as the reason why the prisoner might again be put on trial after a jury in his case had been discharged, the fact that he had neither been convicted nor acquitted, they meant that the test of liability to be so put on trial was, whether there had been a former trial.

In *Ex parte Lange*, 18 Wall., 163, it was held by the majority of the court, Clifford dissenting, that, by the action of the circuit court the petitioner was undergoing punishment a second time for the same offence, and that such a case was within the spirit of the clause in question. The case did not call for a complete exposition of this clause, or of the particular question now under consideration; but it is of importance that the court took, *arguendo*, the same view of the scope of this provision which we have found in the cases and authorities referred to. Mr. Justice Miller, delivering the opinion, said: "In the case of *The Commonwealth vs. Olds*, 5 Littell, 137, one of the best common law judges that ever sat on the bench of the Court of Appeals of Kentucky, remarked, 'that every person acquainted with the history of governments must know that state trials have been employed as a formidable engine in the hands of a domi-

nant administration. * * * To prevent this mischief ~~the~~ ancient common law, as well as Magna Charta itself, ~~pro-~~ *vided that one acquittal or conviction should satisfy the law*; or, in other words, that the accused should always have ~~the~~ right secured to him of availing himself of the ~~plea~~ *as of autrefois acquit and autrefois convict*. To perpetuate this wise rule, so favorable and necessary to the liberty of the citizen in a government like ours, so frequently subject to changes in popular feeling and sentiment, was the design of introducing into our Constitution ~~the~~ clause in question.'" Besides quoting this passage with approval, Mr. Justice Miller used other expressions of ~~his~~ own to the same purport. "Of what avail," he asked, "~~is~~ *the constitutional protection against more than one trial*, if there can be any number of sentences pronounced on the ~~same~~ verdict?" And again: "We do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it. But there is a class of cases in which ~~he~~ a second trial is had without violating this principle. As when the jury fail to agree and no verdict has been rendered," &c. Here the principle is distinctly recognized ~~that~~ a further trial, after a discharge for non-agreement, is ~~not~~ a violation of the Constitution, because the case has not yet been tried. While Mr. Justice Clifford dissented from the conclusions of the majority, he was more emphatic in expressing the same view of this provision. After citing ~~as~~ authority Judge Story's Commentaries, to which we ~~have~~ referred, he added: "What is meant by the clause 'twice put in jeopardy of life or limb' has been judicially defined. * * * It means that a party shall not be tried a second time for the same offence after he has once been acquitted or convicted, unless the judgment has been arrested, or a new trial has been granted, on motion of the party."

In view of these recent expressions delivered in a case in which the court proposed, in favor of the defendant, to give the most liberal application to the clause in question, we think there can be little doubt about the opinion of ~~the~~

court as to the meaning of the earlier case. The meaning which we have imputed to Perez's case is clearly recognized in *Ex parte Lange*. And we may add that we are the more assured that this has been the settled doctrine of the Supreme Court, because we are of opinion that, when this formula was introduced into the Constitution, it was understood at the common law to be merely the equivalent of the rule that no person should be *twice tried* for the same offence; "notwithstanding," as Mr. Justice Washington said, in *Haskell's* case, "some loose expressions to be found in some elementary treatises, or in the opinion of some judges, which would seem to intimate a different opinion." We have not omitted to consider the line of authorities which have so often been arrayed on both sides of this question; but, as the entire history of the subject has been examined with thorough and exhaustive learning in recent English cases, by judges whose competence to determine what the common law has been will not be questioned, it would be an affectation to enter here upon original research; and it is enough to state their conclusions. In *Queen vs. Charlesworth*, 1 Best & Smith, Q. B., 507, Chief Justice Cockburn said: "When we talk of a man being twice tried, we mean a trial which proceeds to its legitimate and lawful conclusion by verdict; and when we speak of a man being twice put in jeopardy, we mean put in jeopardy by the verdict of a jury; and he is not tried or put in jeopardy until the verdict is given." Afterwards, in *Winsor vs. The Queen*, 1 Q. B., 311, he said: "It has been urged upon us that according to the law of England no man ought to be put in peril twice on the same charge. I entirely agree. But we must apply that great fundamental maxim of the criminal law according to its true meaning. It means this: a man shall not twice be put in peril after a verdict has been returned by the jury; that verdict being given on a good indictment, one on which the prisoner could be legally convicted and sentenced." The same conclusion had been elaborately demonstrated by Crampton, J., in *Conway and Lynch vs. The Queen*, 7 Irish Law R., 178, 179, and his reasoning was

approved by all of the judges who sat in *Winsor vs. The Queen*. In *Winsor vs. The Queen*, Lush, J., in commenting upon the objection that the prisoner could not again be put on trial, did not even mention the phrase "twice in jeopardy." He said: "It is alleged that to put a person under these circumstances on a second trial is a violation of a well known maxim of the law, that a man shall not be *twice vexed* for one and the same offence." He thus assumed that the maxim against double jeopardy and the maxim *non bis vexari* were equivalent, and then, as to the latter, proceeded to say: "The meaning of the maxim is that, where the matter has been once litigated and brought to an end by means of the proceedings having gone to a termination, the verdict or judgment shall be a bar to second trial or litigation upon the same matter. * * * Now it is sought to engraft upon that maxim another meaning, and to argue that where the first trial had become abortive and had never gone on to its termination, it should still be a bar to a second trial for the same cause." In *same case* Blackburn, J., had applied the test of *res adjudicata*.

We are satisfied by these authorities, both American and English, that, at the time of the adoption of the Constitution, the rule that no person should be subject, for the same offence, to be twice put in jeopardy of life or limb, was understood by the common law to be only equivalent to the rule which forbade that any person should be twice tried for the same offence, and that this is the meaning of our constitutional rule. In the rest of our inquiry we shall proceed on that ground. We come next, therefore, to the question whether there is any case where a discharge of the jury without a verdict is, in the sense of this constitutional rule, the legal equivalent of a trial and verdict of acquittal, and thus a bar to a future trial for the same offence.

The defendant's general proposition may be formulated as follows: When the Fifth Amendment was adopted the common law had determined definitively when a jury might properly be discharged; it treated an improper discharge as a trial and acquittal; and these rules for determining when

son should be regarded as having been tried, were by cation embodied in our constitutional provision. We therefore to consider whether there was any fixed rule the discharge of the jury before they had given a t; whether a discharge in disregard of that rule was e common law equivalent to a verdict of acquittal, and a bar to a future trial; and whether these rules were plication incorporated in the Constitution. This leads inquire into the history of the rule as to discharges. l be found that it had fluctuated before the adoption : Fifth Amendment, and was not then fixed.

that highly respected treatise, called Doctor and nt, first published in 1523, we find the following pas-
 "If the case happen * * that the jury can in no agree in their verdict, and that appeareth to the justices amination, the justices may in that case suffer them to both meat and drink, for a time, to see whether they gree, and if they will in no wise agree, I think that stices may set such order in the matter as shall seem em by their discretion to stand with reason and con- e, *by awarding of a new inquest*, and by setting a fine em that they shall find in default, or otherwise, as they think best, by their discretion, like as they may do if f the jury shall die before verdict, or if any other like lties fall in that behalf." Dialogue II, ch. 52. This, ampton, J., said in *Conway and Lynch vs. The Queen*, Law R., 177, is "no mean authority." There can be estion that the power was exercised at the discretion : judges, as here stated. Yet Coke afterwards laid a very different rule in the most absolute terms. In stitute, 227b, he said that "a jury sworn and charged ase of life or limb, cannot be discharged by the court, ey ought to give a verdict;" and in 3 Institute, 110, if a person be indicted for treason, felony, or larceny, lead not guilty, and thereupon a jury is returned and , their verdict must be heard, and they cannot be dis- ed." Chief Justice Cockburn spoke very moderately he said, in *Queen vs. Charlesworth*, 1 Best & Smith,

00: "Looking at the passage in Doctor and Student, we are led strongly to surmise that a different practice existed before the time when Coke wrote. It is to be observed, that Coke's rule wholly denies the power to discharge, and that he makes no exception of cases of necessity. If it was a correct statement of the general practice in his time, that rule would seem not to have prevailed very long, as we learn from Hale's unquestionable authority. That learned writer and judge says: "By the ancient law, if the jury sworn had been once particularly charged with a prisoner, as before is showed, it was commonly held they must give up their verdict, and they could not be discharged before their verdict was given up, and so is my Lord Coke. * * But yet the contrary course hath for a long time obtained at Newgate, and nothing is more ordinary than after the jury sworn and charged with a prisoner, and evidence given; yet if it appear to the court that some of the evidence is kept back or taken off, or that there may be a fuller discovery, and the offence notorious, as murder or burglary, and the evidence, though not sufficient to convict the prisoner, yet gives the court a great and strong suspicion of his guilt, the court may discharge the jury of the prisoner and remit him to the jail for further evidence: and accordingly it hath been practiced in most circuits of England; for otherwise many notorious murders and burglaries may pass unpunished by the acquittal of a person probably guilty, where the full evidence is not searched or given." Hale's P. C., 294* and 295*. Now, it is entirely immaterial whether this practice was a safe one, or whether it proved in the end to be dangerous. The question is, whether it was generally recognized by the judges of England to be lawful; and there can be no question that it was so held. We observe that, inasmuch as it actually proved to be dangerous, and was ultimately used for political oppression, it has not unfrequently been spoken of in terms which imply that it was a deliberate and tyrannical subversion of a known rule of the common law; but Cockburn, C. J., has well pointed out in Charlesworth's case (1 Best & S., 500), that it "was a practice anterior by many

years to the time when its abuse caused it to be brought into question ;" and he added that, "though, in the case of *Whitebread and Fenwick*, 7 How. St. Tr., 315, this practice of discharging the jury, for the purpose of furthering the administration of justice and preventing its frustration, was converted into an engine of party and political oppression by Chief Justice Scroggs and his fellow-justices, yet it is a mistake to say that Scroggs and his associates violated the law when *Whitebread and Fenwick* were put on their trial a second time ; they only did what Lord Hale and other most virtuous judges had treated as the law, and administered as such." It is clear, then, that the law permitted a discharge of the jury even in capital cases precisely as Lord Hale has stated ; and that in his time it was a legitimate exercise of discretion to take this course in order to allow a better preparation of proof, if the court found in the evidence at the first trial good reason to suspect the prisoner's guilt.

Inevitably this practice led to a judicial reaction, and hence, undoubtedly, came the consultation among the judges mentioned in *Carthew*, 465 ; S. C., *Holt*, 403. The authority of this report of the matter is said by Foster to have been questioned by the court in the *Kinlochs* case ; but Cockburn accepted it in *Charlesworth's* case, 1 Best & S., 501. The statement is, that the judges, "upon debate among themselves," came to three resolutions : "1. That in capital cases a juror cannot be withdrawn, though all parties consent to it. 2. That in criminal cases, not capital, a juror may be withdrawn if both parties consent, but not otherwise. 3. And that in all civil causes a juror cannot be withdrawn but by consent of all parties." These rules are recognized in 10 Vin. Abr., c. 4 ; 1 Salk., 201, and 7 Mod., 1. It appears to be clear enough that these resolutions were not taken in the decision of a case, but simply upon consultation of the judges, with a view to establish a better and safer rule. All of them were afterwards disregarded ; the first one in the *Kinloch's* case, Foster C. C., 16-21, which occurred among the trials under the commission after the rebellion of

1745. Ten judges sat in that case, and nine of them agreed that judgment ought to pass upon the prisoners, notwithstanding there had been a discharge of the jury. "They agreed," says Foster, "that, admitting the rule laid down by Coke to be a *good general rule*, yet it cannot be universal~~ly~~, binding, nor is it easy to lay down any rule that will be so." Foster delivered a concurring opinion, and said: "The general question is a point of great difficulty and of weighty importance, and I take it to be one of those questions which are not capable of being determined by any general rule that hath hitherto been laid down, or possibly ever may be. For I think it is impossible to fix upon any single rule which can be made, to govern the infinite variety of cases which may come under this general question, without manifest absurdity, and in some instances without the highest injustice." Such language as this could not have been used, if it had been understood that the rule on the subject of discharge stood on the footing of a rule of the common law, or that it was fixed and settled even as a rule of practice. It was the language of judges who knew that the matter belonged to the province of judicial discretion.

About twenty-three years after the Kinlochs case, Blackstone published the fourth volume of his Commentaries, and here we find another attempt to formulate a rule. He says: "When the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged, unless in cases of evident necessity, till they have given in their verdict." 4 Black., 360. It will be observed that Blackstone's rule differs from Coke's in two important respects; first, in forbidding the discharge only in case evidence has been introduced, and, secondly, in allowing it in cases of necessity. We are aware that an attempt has been made to reconcile them as to the latter point, by suggesting that in Coke's rule the exception of a case of necessity is to be implied; but it is plain that Coke himself intended to state the rule absolutely. But, finally, even this last formula laid down by Blackstone has not been followed either in England or in this country. After quoting

it, Cockburn said abruptly, in Charlesworth's case: "I say that is not a true exposition of the law as practised in our time." We are aware that the reluctance of the courts to break away from a precise statement of any rule has caused them to explain that their discharge of a jury was done under what should be considered circumstances of necessity; but it is plain that they were compelled to explain away the force of words, and that they practically emancipated themselves from Blackstone's rule of necessity. They have discharged juries, not because they were obliged to do so, but because it was for the interests of justice to do so.

Now, can it be said, in view of these variations in the rule and practice as to discharging juries, which continued down to a period so nearly preceding the adoption of our Constitution, that there was then a fixed and universally known rule of the common law on that subject; or that the rule could be called in any proper sense a rule of the common law at all? This whole subject has, as we have already said, undergone a thorough investigation in recent English cases, and conclusions touching this question have been pronounced by judges whose knowledge and judgment of the history of the common law cannot well be questioned. After such an examination, Cockburn, C. J., said, in Charlesworth's case, 1 Best & S., 498: "I apprehend that in no part of our procedure has the practice of the courts more fluctuated than in relation to the practice of the discharge of the jury in criminal trials;" and in Winsor's case, 1 Q. B., 301, he said: "We are dealing here, not with one of those principles that lie at the foundation of our law, such as the maxim that judges shall decide questions of law, and juries questions of fact; or, that the verdict of the jury, in order to be binding, must be unanimous; we are dealing with a *matter of practice*, which has fluctuated at various times, and which, even at the present day, may perhaps not be considered as settled." And in Conway and Lynch's case, even the judges who applied Blackstone's rule strictly, and sustained a plea like that before us, spoke of the history of the rule in the same manner. Perrin, J., said: "That the rule

upon this very important question has been varied from time to time, either qualified, corrected or differently understood, is unquestionable." 7 Ir. L. R., 161. And Pennefather, C. J., said: "We have heard mentioned the common law principles that did govern the rule that existed upon the subject; but I will not go through the various modes and gradations that took place with regard to the practice in the administration of justice connected with this subject. There were undoubtedly general rules laid down, which were afterwards found, if not absolutely necessary, at least it was found expedient to make a modification in. That there were extravagant rules existing, connected with this subject, which for many years were carried into execution, cannot be denied. I think no man can now say that these rules ought, consistently with justice or common sense, to be any longer the law of the land; but are we at liberty, therefore, to consider or treat them as totally abolished?" Then, in speaking of Blackstone's rule, he said: "At that time the better sense of succeeding periods produced this qualification in the rule then and theretofore laid down." The legal import of these remarks is unmistakable. Both of these judges treated what they called a rule of law as having been a rule of practice, subject to alteration according to the "better sense" of the courts. And it seems to be clear that this rule has not effectively assumed at any time to be a rule of the common law in the sense which is necessarily insisted on when it is said to be an implied term of our constitutional rule. Its very fluctuations lead to the conclusion that, as formulated at different times, it only purported to be an effort of the judges to lay down a guide for judicial discretion; that it was nothing more than a rule of practice, subject to judicial control, and in its nature liable to change in order to meet exigencies as they should arise. We think, therefore, that the first part of defendant's proposition, as we have formulated it, namely, that when the Fifth Amendment was adopted there was a definitive rule of the common law which determined when a jury might properly be discharged, is not maintainable. Of course it follows that, if

there was no such definitive rule, but only a judicial practice, necessarily and actually fluctuating, it is not admissible to assume that this fluctuating rule of practice was, in contemplation of the Constitution, a fixed and positive rule. And as the proposition that an improper discharge of the jury is, in the sense of the Constitution, a trial and acquittal, and for that reason a bar to further jeopardy, depends absolutely upon the existence of a fixed rule for determining when a discharge is improper, that proposition also must fall. Whatever the scope of the constitutional protection against a second trial for the same offence may be, we must hold that it is certain and unalterable by judicial practice or by legislation; and if the Constitution does not embody by implication any rule for determining when the discharge is improper; in other words for determining when the equivalent of a former trial exists, that rule, being outside of the Constitution, is open to change and modification, either by judicial practice or by legislation; so that circumstances which would be equivalent to and constitute a former trial and acquittal at one time would not do so at another. Thus a further trial would be constitutional or unconstitutional according as legislation should regulate the lawfulness of discharging the jury. Clearly the Constitution cannot be said to include the equivalent of a former trial and acquittal, when the means of ascertaining that equivalent are not governed by it.

Now, as a matter of fact, Congress has legislated upon this very subject of discharging the jury in a criminal case; not *eo nomine*, but effectively. The act of April 20, 1802, 2 Stat., 159, provided that, whenever any question should occur before a circuit court, upon which the opinions of the judges were opposed, the point of disagreement should, upon the request of either party or their counsel, be certified to the Supreme Court, and be finally decided there. The decision and order of the Supreme Court were to be remitted to the circuit court, and there entered of record and have effect. The section concluded as follows: "*Provided*, that nothing herein contained shall prevent the cause from pro-

ceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits: *And provided, also*, That imprisonment shall not be allowed, nor punishment in any case be inflicted, where the judges of the said court are divided in opinion upon the question touching the said imprisonment or punishment." See, also, the act of June 1, 1872, ch. 255, 17th St., 197. These provisions are now embodied in sections 651 and 697 of the Revised Statutes. Under this statute, points of disagreement have repeatedly been certified to the Supreme Court, and the constitutionality of its provisions and of their consequences is not open to question. By its authority the judges might proceed with the cause, notwithstanding the matter of difference, if, in their opinion, further proceedings could be had without prejudice to the merits; or they might discharge the jury and continue the cause, to await the decision of the Supreme Court, if they thought otherwise. Of course the latter course might involve a trial before another jury. Another act, of similar effect, was passed in 1846. The act of August 8, 1846, sec. 3, 9th St., 72, authorized the district court, when, in the opinion of the court, difficult and important questions of law were involved in the case, to remit an indictment to the circuit court; and the proceedings thereupon were to be the same in the circuit court as if the indictment had been originally found and presented therein. This provision is still in force as section 1038 of the Revised Statutes. In *United States vs. Morris*, 1 Curtis C. C., 23, it was insisted, on the part of defendant, that the statute intended that the case should be so transferred before any proceedings subsequent to the indictment should be had in it. But Mr. Justice Curtis pointed out that the difficult and important questions referred to were not to be known by inspection of the indictment, and before examination of the case; and especially that the statute described them as questions "involved in the case." He held, therefore, that the sound construction of the clause was, that the opinion of the judge, touching the importance and difficulty of the question, was to be arrived at in the usual course of justice, after an

was made, "and the parties so far heard as to develop questions which exist." Under the operation of this the jury is discharged simply because the district judge opines that a question is difficult and important, not because he cannot decide it; and the consequence is, that the case is put on trial before another jury in the circuit court. It is to be observed that, as the jurisdiction of the district courts of the United States includes not only misdemeanors, but felonies not capital, the power exercised by Congress in this act, to determine the grounds on which a jury might be discharged and the accused again put on trial, applies to both classes of cases. The constitutionality of this act has been conclusively recognized by the courts of the United States; and, although it does not apply directly to this court, it has established a conclusion which does not bind us, namely, that neither the lawfulness of the discharge of the jury, nor the effect of an unlawful discharge constitute an acquittal, are by implication *governed by the constitution*, but are dependent upon the will of the legislature. It may well be said also to affirm another general principle; that the court has power to discharge a jury not only in a case of necessity, but when, in its sound judgment, it is for the interests of justice that it should be done. Notwithstanding these conclusions, we proceed next to consider whether what is alleged to be an improper discharge of the jury was, by the common law, equivalent to a verdict of acquittal; for upon this ground rests the assertion that it is equivalent to such a verdict in the sense of the Sixth Amendment to the Constitution. And here it may be observed that the argument touching the effect of an improper discharge always contains an assumption that the rule, forbidding or restricting discharges, was adopted as a means of preventing the accused from being twice in jeopardy. In other words, that it originated in the right of the prisoner to have a verdict in the first trial as a bar against a future trial for the same offence. In Conway and Lynch, Crampton, J. pointed out that this rule was part of a practice which for-

bade the adjournment of a trial, the separation of a jury, and the enjoyment of fire, light or food, until they should give in their verdict; and observed that "the principle of these severe regulations was that the non-agreement of a jury within a reasonable time, was evidence of refractoriness and perverseness on the part of the jury and a contempt for the administration of justice, and that they should therefore be coerced into agreement by personal suffering and inconvenience." 7 Ir. L. R., 169. The same solution of the old practice was stated in Charlesworth's Case, 1 Best & S., 499*. It is to be remembered, too, that the rule against discharge was originally applicable to civil as well as to criminal cases; in other words, that it was applied where it could not possibly have any reference to the right of a party to be protected against being twice put in jeopardy. Carthen, 465; Morris *vs.* Davis, 3 Car. & P., 427; 2 Hale, 297; 7 Ir. L. R., 169; 1 Best. & S., 502*. The whole practice, including the matter in question, would seem, therefore, to have been simply a set of rules concerning trial by jury; rules concerning the treatment and management of the jury and not for securing the rights of parties. Undoubtedly the particular rule in question came to serve as a protection of the prisoner in criminal cases, and, as times changed, was intentionally so used, but it did not originate in the prisoner's right, and is not to be interpreted on the ground that it had such an origin. It is shown, accordingly, in the English cases, to which we have referred, that a discharge of the jury was not at common law equivalent to acquittal. After an examination of the authorities, Crampton, J., said: "My opinion is that a premature or irregular discharge of a jury cannot be made equivalent to an acquittal by verdict." 7 Ir. L. R., 181. In Winsor's Case, Blackburn, J., after mentioning Crampton's judgment, said: "I entirely concur in the conclusion at which he arrives, that where there has not been a verdict decisive of the guilt or innocence of the prisoner, and the indictment has not been disposed of, whether it is owing to the mistake of the judge, the fault of the jury, inevitable

accident, or the improper discharge of the jury ; in all these cases indifferently a *venire de novo* ought to be awarded. I am, therefore, of opinion that the discharge of the jury at the first trial was not equivalent to an acquittal." And Lush, J., said in the same case: "I, with the other members of the court, adhere to what is esteemed the very preferable judgment of Crampton, J., and we do no violence to the maxim by holding that, when the first trial has become abortive by any means whatever, the proceeding is not legally a bar to a second trial for the same offence." Mellor, J., said: "But, admitting he was wrong, and did discharge the jury erroneously, and exercised his discretion erroneously, is the discharge of the jury equivalent to a verdict? The only case in which it has been so contended, is Conway and Lynch *vs.* Reg., 7 Ir. L. R., 149. To an indictment for felony, with the exception of the plea of not guilty, I have heard only of four pleas, *autre fois acquit*, *autre fois convict*, *autre fois attaint*, and a pardon being pleadable in bar. If the facts of this case cannot be brought within either of these pleas, there is no other mode of pleading them." That case taken on writ of error to the Exchequer Chamber where Erle, Ch. J., delivered the unanimous opinion of the court, in which Pollock, Chief Baron, Martin, Bromwell and Pigott, Barons, and Byles and Montague Smith, JJ., sat with him. Erle, Ch. J., said: "Even if it was assumed, for the sake of argument, that the statement on the record led the judges of the court of error to the opinion that the order for the discharge in question was an improper exercise of discretion on the part of the judge who tried the case, still we should hold that such a discharge was no legal bar to a second trial on the same or a fresh indictment. The only pleas known to the law founded upon a former trial, are pleas of a former conviction or a former acquittal for the same offence ; but if the former trial has been abortive without a verdict there has been neither a conviction nor an acquittal, and the plea could not be proved. That which would be matter of plea to a fresh indictment would be ground of error upon a second trial on the same indict-

ment. As far as relates to the former abortive trial nothing which took place could be ground of error on the second trial on the same indictment, unless it would have been a bar by way of plea to a new indictment for the same offence. All the authorities are concurrent to this effect, with the single exception of Conway and Lynch, 7 Ir. L. R., 149; and we have before given our opinion on that case."

These cases show that even an improper discharge of the jury was not, by the common law, equivalent to an acquittal by verdict, and could not be set up as a defence by plea; and it is important to observe that the same authority holds that it could not therefore be alleged as error. It was simply not matter of defence, and did not show a second trial to be unlawful. The application of this conclusion is immediate. If a discharge of the jury could not in any case be counted as a first trial, with consequent acquittal, in the sense of the common law rule which prohibited a second trial for the same offence, there is no ground for holding such a discharge to be a trial and acquittal in the sense of the same rule when it is incorporated in our Constitution. In short, the alleged rule as to the discharge of a jury, with its alleged consequences, is not in any sense a part of our constitutional rule. At common law the rule that a person should not be tried twice for the same offence, and the rule concerning the discharge of a jury, whatever it may have been, were separate and distinct, and even a disregard of the one was not a violation of the other. The first was put into our Constitution; the other was not. Precisely this point was recognized by Mr. Justice Washington in *Haskell's Case*, 4 Wash. C. C. Rep., 410. He there said: "We are, in short, of opinion, that the moment it is admitted that in cases of necessity the court is authorized to discharge the jury, the whole argument for applying this article of the Constitution to a discharge of the jury before conviction and judgment is abandoned, because the exception is not to be found in any part of the Constitution. * * We admit the exception, but we do it because that article does not apply to a jeopardy short of conviction." This statement is in effect a distinct denial

that the constitutional rule applies to any case of abortive trial. We are aware that the learned judge seemed to admit that an improper discharge of the jury might, nevertheless, be reached as matter of error at common law; we concur in the contrary position of Erle, C. J., in *Forster's Case*, and we think that Mr. Justice Washington's opinion was not supported by the decision of the Supreme Court in *Perez's Case*, 9 Wheaton, 579. The court there said: "We think that in all cases of this nature, the law has invested courts of justice with authority to discharge a jury and give a verdict, whenever, *in their opinion*, taking all circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define *all the circumstances* which would render it proper to interfere. To interfere, the power ought to be used with the greatest caution; and in urgent circumstances and for very plain and obvious reasons; and, in capital cases especially, courts should be extremely careful how they interfere with any chances of life in favor of the prisoner. *But, after all, they have the right to order discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion rests, as in other cases, upon the responsibility of the judges, under their oaths of office.*"

It was claimed, in the argument, that when the court said that the law had invested courts of justice with authority to discharge the jury "in all cases of this nature," they referred only to cases where the jury were unable to agree; Mr. Justice Curtis said, in *United States vs. Morris*, 100 U. S. 36, that they were speaking of capital cases; several expressions in the passage we have just quoted show that they intended to state a rule applicable to all cases. The "circumstances" and "causes," to which courts would look, were not intended to be restricted to the circumstances of non-agreement. The point, however, to which we refer is, that the Supreme Court must be understood to have held that this matter of the discharge of the jury was

not controlled by the Constitution. And they plainly intimated that the exercise of the power to discharge was matter of discretion and not matter of error, when they said that "the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, *upon the responsibility of the judges, under their oaths of office.*" It was with a distinct reference to this case, that Mr. Justice Curtis said, in *United States vs. Morris*, that, "in all cases within the jurisdiction of the district court, it is in the power of that court, as it is in the power of the circuit court, even in capital cases, to take the case from a jury impanelled to try it, whenever, in the opinion of the court, it is necessary, or required by *the interests of justice to do so;*" and, in a later passage, that, "*the finding of a cause for withdrawing a juror, or taking a case from a jury, is a judicial act; the authority to do it is entrusted to that court, and no other court can revise its decision.*"

In accordance with these decisions, we hold that no rule touching the discharge of the jury has, by implication, been incorporated in or referred to by the constitutional rule to which the defendant appeals; that the courts of the United States are invested with power to determine conclusively, in the trial of a criminal cause, when the interests of public justice require that the jury shall be discharged, and that, consequently, such a discharge is not in any case equivalent to a verdict of acquittal, or a defence against a further trial upon the same or a new indictment. Whenever this power shall appear to be dangerous in the hands of the judges, it can be restricted or regulated by Congress; for the whole subject, not being an implied term of the constitutional provision, is subject to legislative control. That it has yet proved to be dangerous, or that it is likely to be so, we do not conceive to be a matter worthy of discussion.

It will be understood, of course, that we do not regard the power to discharge a jury without a verdict as containing the slightest element of arbitrary choice. The discretion to apply it is one which the trial justice must use under a

own obligation to satisfy his judgment that such a course required by the interests of justice; and even as to this there are well established limitations which he is not at liberty to disregard. It would be inexcusable, for example, to discharge a jury, with a view to a further trial, because

the Government is not prepared to go on with the prosecution; and it would be in the power, and would be the duty of the same judge, or of another judge who might be called on to try the prisoner, after such a discharge, to enter a new trial. As to the discharge in the case before us, we may remark that the bill of exceptions, in which the circumstances are set forth, does not show that it was ordered merely for purposes of convenience. The true purpose and ground of the discharge are disclosed by the order made immediately afterwards, and before the reswearing of the jury, by which the consolidation of the fourteen indictments was dissolved. It is apparent that the judge who tried the cause decided that the interests of justice required such separation of the indictments, and to that end a discharge of the jury. Inasmuch as the prisoner was tried by the very jurors whom he had just accepted, and before his witnesses were allowed to disperse, the only practical change in his position was, that he was tried on one selected indictment, instead of being tried upon that and other indictments consolidated. One of the indictments thus excluded was found under a statute which allowed a longer imprisonment than is provided by the statute under which he was actually tried. Judgment affirmed.

JOHN A. HAMILTON ET AL. vs. RICHARD H. CLARKE ET AL.

EQUITY. No. 9063.

{ Decided February 2, 1885.

{ The CHIEF JUSTICE and Justices MAC ARTHUR and JAMES sitting.

Where a sale of realty is directed to be made after the death of tenant for life, who is one of two executors, and there is no specific mention as to by whom the sale is to be made, there is no power of sale in the surviving executor; but the court will, on application of the parties interested, appoint a trustee to sell.

STATEMENT OF THE CASE.

John B. Boone died July 17, 1859, testate, seized of ~~two~~^{two} lots of ground in the city of Washington, both improved ~~and~~^{and} and worth about \$10,000. His will, dated June 17, is ~~as~~^{as} follows:

"First. It is my will, and I do order that all my just debts ~~and~~ and funeral expenses be duly paid and satisfied, as soon conveniently can be after my decease, out of the first money ~~that~~ that shall come into the hands of my executors from ~~much~~ much of my personal estate as may be necessary to ~~me~~ and fully discharge the same.

"Item. I give and bequeath to my beloved wife, Jane Boone, in addition to her right of dower at common law, ~~my~~ my personal property of every kind and description ~~where~~ ~~soever~~ ~~and~~ ~~wheresoever~~ situated, after the payment of ~~my~~ just debts and funeral expenses, during her natural life, ~~to~~^{to} use, enjoy and dispose of the same, and at her death to ~~dis~~^{dis}pose of the same, as she may deem fit and proper.

"Item. I give and devise to my said loving wife, Jane ~~E.~~ Boone, all my real estate, being part of lot numbered 15, ~~in~~ in square 347, with the buildings thereon; and also the brick house and lot in square No. 348, all being and lying in ~~the~~ the city of Washington, D. C., for and during her natural life, to have, use and enjoy the same; and at her death it is ~~my~~ my will that the sum of three hundred dollars (\$300) shall ~~be~~ be paid to my beloved nephew, Alexander Hamilton, out of ~~the~~ the proceeds of the sale of my real estate aforesaid.

"Item. It is my will, and I direct, that at the death of

my said wife, Jane E. Boone, all my real estate as herein devised shall be sold, and, after paying the legacy above mentioned to my said nephew, Alexander Hamilton, or to his heirs, the residue to be divided into two equal parts or moieties—the one half or moiety, to be equally divided between my brothers, Sylvester Boone, Edward D. Boone, and my sisters, Mary Rose Bowling and Sarah Ann Hamilton, each to have equal shares; and in case of the death of either of them, then to the heirs of said deceased in the same proportion. Item. And it is my will that the other half or moiety of the proceeds of my real estate go to the heirs of my said wife after her death, or to such person or persons as she may devise and bequeath the same to.

Lastly, I hereby appoint my loving wife, Jane E. Boone, and my trusty and well beloved friend, Richard H. Clarke, executors of this, my last will and testament.

“JOHN B. BOONE.”

The widow, Jane E. Boone, and the defendant, Richard H. Clarke, qualified as executors. They filed a final account showing payment of all debts and a distribution of \$726.50 to the legatee.

Jane E. Boone had the full possession and benefit of the real estate from her husband's death to January 25, 1884, when she died.

Clarke, the complainant, in Equity Cause No. 8921, filed a bill to have the will construed as to his authority, as surviving executor, to sell the real estate.

Whereupon, the complainants filed the bill in this cause, stating they are advised that said Clarke has no power to sell the real estate by virtue of the will; that he has intimated that he would insist on receiving maximum commissions as executor for his services in selling; that many of the beneficiaries are in poor circumstances, and desire an economical sale, and that John A. Hamilton or Frank D. Orme, or both, are responsible parties and interested in the estate, will make sale and distribution, if appointed by the court, without any commissions whatever.

That the parties to this suit are the only ones having any interest in the property.

The answer of Richard H. Clarke admitted, substantially, all the material facts of the bill, but raised the question of law as to his power and duty, as the surviving executor under the will of Boone, claiming that the power of sale was given by implication, and survives to him.

Proof was taken by complainants, establishing the averments of the bill, and showing that the defendant, Clarke, was a non-resident of this District, and has been for about twenty years.

On hearing, the court below consolidated the causes, and decreed: "That the defendant, Richard H. Clarke, as surviving executor of the will of John Baptist Boone, has full power under said will to make sale and conveyance of the real estate therein directed to be sold."

And from this decree an appeal was taken.

EDWARDS & BARNARD for complainants:

The only questions in controversy in this suit, are—

1st. Has the defendant, Clarke, any power, as trustee or surviving executor, under the will of John Baptist Boone, to sell and convey the real estate described? And—

2d. If any such power can be implied, does not his long continued non-residence from this District, warrant the court, on application of the beneficiaries, in substituting some one else as such trustee in his stead?

We maintain that any power which is given by will to executors, either expressly or by implication, is given to all of them; and that all can do whatever one could do, if only one was named; and that a survivor of two can have no greater authority than the two could have together. In other words, that the office of executor is a single office, though it be filled with two or more persons; and when so filled with two or more persons, they have all powers jointly, and no power which could not be exercised by them jointly, could survive.

All the powers under a will come into life at the death of

or; and no new power could arise by implication of executor by the death of a co-executor.

case of *Bentham vs. Wiltshire*, 4 Madd., 44, the court said, "that the sale is directed to be made after the death of the tenant for life, who was one of the executors; and, therefore, no power of sale in the executors."

This question is also considered in the following cases:

Fryer, 3 Ad. & Ell. (N. S.), 442 (43 Eng. Com. L.); *Patton vs. Randall*, 1 Jacobs & Walker, 189; *Ex parte Fox*, 52 N. Y., 536; *Lippincott vs. Lippincott*, 121 N. Y., 121.

Section 4 of Md. Code, 1785, ch. 72, sec. 4, (Thompson's Digest), provides that "if any person hath died, or leaving real or personal estate to be sold for the payment of debts or other purposes, and shall not, by will or instrument in writing, appoint a person or persons to convey the same property," &c., "the chancellor shall give full power," &c., to appoint trustee to sell, &c., or to make partition," &c. 4 Gill & J., 329.

It is held that an executor named as executor has power to sell real estate without express authority by the will, still an additional authority is certainly provided by this statute; and the jurisdiction of the court is ample for the appointment of a trustee, or the administration and settlement of an estate.

It was given as executors for the purposes of procuring the proceeds of sale of real estate; and the defendant, in his answer, confesses that his power is questionable by the bill in No. 8,921, asking the court to say whether or not.

There was no question as to Mr. Clarke's power, the court said, and he still has authority, on the request of beneficiaries to remove him as trustee, and appoint some one in his place on the ground that he has removed from the State and is permanently located in New York; and as there is no good reason why the property of beneficiaries should be paid to him in commissions, the court wishes, if the division can be as well made

without expense. Perry on Trusts, secs. 275, 281, 818 Uvedale *vs.* Ettrick, 2 Ch. Cases, 130; Smith *vs.* Smith, 1 Hare, 71, (44 Eng. Ch., 795); Commegys *vs.* The State, 1 Gill & J., 183, 184; Dorsey *vs.* Thompson, 37 Md., 45, 47 Ketchum *vs.* R. R. Co., 2 Woods, 532; Curtis *vs.* Smith, 6 Barb., 9.

The appointment of a trustee, whenever it is necessary to apply to the court in the premises, is always a discretionary matter, upon a view of the whole case; and the trustee to be appointed should, in all cases, reside within the jurisdiction of the court. Alex. Chan. Pr., 144; Hinkley's Testamentary Law, sec. 1879; Howard *vs.* Waters, 19 Md., 535; 1 Sugden on Powers, 139.

In this case, Mr. Clarke has voluntarily brought the subject matter of this trust before the court, and we maintain that the court should deal with it as may best accommodate the parties entitled to the proceeds of sales.

We submit, therefore, that the decree below should be reversed, in so far as it authorizes Mr. Clarke to make sale of said real estate, and Mr. Hamilton and Mr. Orme, or one of them, appointed in his stead.

IRVING WILLIAMSON for defendant Clarke:

Mr. Clarke claims that, as surviving executor under the will of John B. Boone, the power and duty of making sale of the real estate thereby directed to be sold, is vested in him, and in him alone, and the time of sale as fixed by the will having arrived, he cannot be divested of that power except by his consent or for misconduct. Neither of these grounds existing, his right, based as it is upon well settled rules of law, is unassailable.

"It is a well settled rule in chancery in the construction of wills as well as other instruments, that when land is directed to be sold and turned into money, or money is directed to be employed in the purchase of land, courts of equity, in dealing with the subject, will consider it the species of property into which it is directed to be converted.

This was the doctrine of the Supreme Court in Craig *vs.*

Leslie, 3 Wheaton, 577, and in *Peters vs. Beverly*, 10 Peters, 562, and, as is said in the last named case, "is founded upon the principle, that courts of equity regarding the substance, and not the mere form of contracts and other instruments, consider things directed or agreed to be done as having been actually performed."

The will now under consideration, in the most positive terms, directs, "that at the death of my said wife, Jane E. Boone, all my real estate as herein devised shall be sold," a "legacy" of \$300 paid to his nephew, Hamilton, and the balance is to be applied in the payment of legacies to a variety and number of individuals who are not all of them of the heirs or next of kin of the testator. Such a division of the entire fund, to say nothing of the Hamilton legacy, constitutes legacies under the decisions, and such payments are equally within the province of an executor as the payment of debts.

A legacy is defined (Williams on Executors, sec. 497) to be "some particular thing or things given or left either by a testator in his testament, wherein an executor is appointed, to be paid or performed by his executor, or in a codicil or last will, wherein no executor is appointed, to be paid or performed by an administrator."

Debts must be paid before legacies, the will expressly directs payment of debts, and this is in the direction of the argument that the executor is to act here. Now as to the power of sale under the will.

Although the clause does not name the executors as the persons who are to sell the land (and at the same time names no other person or persons to sell), yet it is a power vested in the executor, and, in this case, in the survivor, by necessary implication. The land is to be sold for the purpose of paying legacies, which is a duty devolving upon an executor, and it follows, as a matter of course, that the testator intended his executor should make the sale to enable him to discharge the duty and trust of paying the legacies.

"It sometimes happens that a testator directs his estate to be sold for certain purposes without declaring by whom

the sale shall be made. In the absence of such declaration if the fund be distributable by the executor, he will have the power by implication. In a case in the year book, 1 Henry VII, it was said by Rede, Tremail and Frowick, that if a man make his will that his land which his feoffees have shall be sold and aliened, and does not say by whom, the his executors shall have alien and not his feoffees" * *

"for the money to arise by the sale of the executors shall be assets in their hands, and therefore they shall sell. In a case in the 16th Elizabeth, a man devised his lands to his wife for life, and because he was in doubt whether he should have issue or not, he further willed by his will that if he should not have any issue by his wife, that then, after the death of his wife, the lands should be sold, and the money thereof coming distributed to three of his blood, and made his wife and another his executors, and died. The executor proved the will, the other executor died, and the wife sold the land; and it was the opinion of Wray and Southgate Justices, that the sale was good, although it was not expressed in the will by whom the land should be sold, for the money coming of the sale are to be distributed by his executors to persons certain, as legacies, and it appertains to executors to pay the legacies, and therefore they shall sell. Also they held that the lands should be sold in the life of the wife, otherwise they could never be sold; and also the surviving executor shall sell the lands because the authority doth survive. The same point was decided in the same way in a case in the 23d of Elizabeth. A man excepted out of his devise his manor of R., which he appointed to pay his debts, and made two executors and died. One of the executors died, the other proved the will and sold the manor, and by the opinion of the court the sale was valid, for such was the intention of the testator and not to leave the reversion to his heirs, but to trust his executors with the sale for the speedy payment of his debts." 1 Sugden on Powers (5 American ed.), 194.

A testator, after directing all his just debts to be paid and bequeathing certain personal estate to his wife for life

devised a freehold house to her for her natural life, with liberty to sell it, in case of a good offer, and invest the proceeds in five per cent. stocks for her benefit during her life. And in a subsequent part of the will, he desired that at the death of his wife, the residue of the estate might then be collected, including the proceeds of the house and lot, if not previously sold, to be then disposed of to good advantage, to be divided as directed. Three executors were named, Forbes, Cooper and the wife; Forbes and the widow proved the will, and Cooper died in the lifetime of the widow. After the death of the widow, Forbes, the surviving executor, entered into a contract with Peacock for the sale of the house. Held, upon a bill by the executor to compel the purchaser to take, "that whether there were or were not debts unpaid, and whether it was or was not uncertain whether any debts remained unpaid, the plaintiff had a power to sell and convey the house in fee-simple." *Forbes vs. Peacock*, 11 Meeson & Wellsby, 630.

The doctrine contended for was recognized by Chancellor Kent, who, in a case where the will directed that the real estate be sold at public vendue when it became necessary to raise money for the legacies, or when the children arrived at age, but did not say expressly who should sell, said: "I think as Lord Hardwicke did in a case somewhat similar (*Black vs. Wilder*, 1 Atkyns, 420), that it is a very reasonable construction that the power is given to the executors." *Davons vs. Fanning*, 2 Johns. Chan., 252.

The principle is settled by the Supreme Court in *Peters vs. Beverly*, 10 Peters, 562, and again in *Taylor vs. Benham*, 5 Howard, 267. In *Peters vs. Beverly*, the case in 2 Johns. Chan., the case of *Johnson vs. Hewitt*, 15 Johns., 349, and the quotation from Sugden, given above, are referred to. To the same effect is the case of *Magruder vs. Peter*, 11 G. & J., 217.

It may be said, as was argued below, that it was not the intention of the testator that his executors should sell, for one of them, the wife, must necessarily be incapable of acting before the time of sale arrived.

It is evident that he did not intend his wife to sell, and it is equally clear that he did intend that his "trusty and well beloved friend," Clarke, should sell and pay the legacies in the event he survived the testator's wife. But in such a case the power survives as a clear principle of law. So it was held in the case of *Forbes vs. Peacock*, which is directly in point, and which was a proceeding, not to protect the title of an innocent purchaser, but to compel a man to take a title which he did not want. Such is the doctrine stated by Sugden, and in the decisions to which he refers; so it was held in the cases in New York, the case in Maryland, and by the Supreme Court.

Against this current of authority there seems to be but one case, that of *Bentham vs. Wiltshire*, 4 Maddox Ch. Rep. 30, decided in 1819. The reasoning of that case is not satisfactory, and it is followed in 1843 by *Forbes vs. Peacock*, decided by a superior court, establishing directly the principle contended for by Mr. Clarke, and which was recognized by the court below.

Mr. Clarke was in the act of discharging the trust reposed in him by the will, having been called upon so to do by the parties in interest, and as his power is clear upon the authorities, it is respectfully submitted that the decree appealed from should be affirmed.

Mr. Chief Justice CARTER delivered the opinion of the court.

In the case of *Clarke vs. Boone*, we have an application on the part of an executor to be advised as to his powers under the will of his testator to sell certain real estate. And in *Hamilton and others against Clarke and others*, we have a bill in equity, praying the appointment of trustees to sell the same property, and distribute the proceeds among the devisees.

The court below very properly consolidated the two cases, and they were heard there and are heard here together.

The value of the matter in dispute is not of very large import in itself. It is agreed that the property should be

d. But the question is whether it should be sold by the executor, who will be entitled to charge the usual commission for such service or whether the court will appoint certain persons trustees to sell who have signified their willingness to perform the duty without charge to the estate. The first feature of this case which arrests our consideration is that at all of the devisees and heirs of this estate unite in asking to be permitted to sell it in their own way and without cost. They state that the beneficiaries are numerous and poor, that the estate is small, and, therefore, ought not to be loaded down with commissions when it can be avoided. Opposed to this is the remonstrance of the defendant Clarke, who does not claim to have been appointed a trustee specifically and in terms, to make sale of the property, but who claims to have inherited the right under a general grant of trust to him and to an executrix with him jointly, the latter having expired, and he being her survivor. So that we have the question whether a naked trustee has such a vested interest in the estate of a testator that he can sell it against the wishes of those who own it, and charge the estate with such commissions when others are willing to make the necessary sale without charge.

Unless we are under imperious obligation to support such trustee in the exercise of such a right, we ought not to do so.

It would be doing scarcely less than committing a waste on an estate that could not afford it, and paying a man for performing a service, the gratuitous performance of which is rendered by others who are concurred with by all those who are interested in the estate.

We think that even if this trust was lodged specifically in this trustee jointly with another of whom he is the survivor, still it would be in the power of the devisees of this estate to say: "We do not need you; you were appointed trustee to sell this estate, provided, always, that we want you; that is the only office conferred upon you, and we assume the right as owners of this property, to say we do not want you to take a commission out of it. We can sell it without your assistance."

And unless the court were compelled to do otherwise, it might be by the specific language of the will, it will say to him: "The owners of this property have a right to determine whether you shall sell it or not. You are appointed in the interest of the estate—not to devour it or to sell it against the will of those who own it."

Let us examine the defendant's position. He sets forth in his petition that he is the survivor of Jane E. Boone for the purposes of the execution of this will, and as such survivor he says he has a right, as a sole trustee, to proceed to sell the property. But is he such a survivor at all?

There was a joint trust created in the first clause of the will to these two executors. It provides:

"It is my will and I do order that all my just debts and funeral expenses be duly paid and satisfied, as soon as conveniently can be after my decease, out of the first money that shall come into the hands of my executors, from so much of my personal estate as may be necessary to me, and fully discharge the same."

And again in the last clause is the following:

"I hereby appoint my loving wife, Jane E. Boone, and my trusty and well beloved friend, Richard H. Clarke, executors of this my last will and testament."

These trustees proceeded to execute this trust jointly. They collected all the personal assets and paid all the debts, distributed the surplus to the devisees and finally settled their account; and then the defendant went to New York, and forgot that he was any longer a trustee until the death of his co-trustee, when he was written to, and he soon discovered that it might be possible to make a commission out of this estate, for there could not be any other motive in his desire to act as the salesman of it.

Now, when these two trustees had settled their joint account in which they were charged with a joint duty under this will, we hold that their connection with it ceased under the terms of the will. I, myself, was not of that impression when the argument was proceeding at bar, for the case was discussed upon the hypothesis that the defendant Clark

was a surviving trustee. But it will be seen, as we proceed with the examination of this will, that he was no survivor of any trustee. The will outlives this joint trust, as will be seen by its terms.

“Item 2d. I give and bequeath to my beloved wife, Jane E. Boone, in addition to her right of dower at common law, all my personal property of every kind and description whatsoever and wheresoever situated, after the payment of my just debts and funeral expenses, during her natural life, to use, enjoy and dispose of the same, and at her death to dispose of the same as she may deem fit and proper.”

By that clause he disposed of his estate absolutely to his wife. He proceeds—

“Item. I give and devise to my said loving wife, Jane E. Boone, all my real estate, being part of lot numbered 15 in square 347, with the buildings thereon; and also the brick house and lot in square No. 348, all being and lying in the city of Washington, D. C., for and during her natural life, to have, use and enjoy the same; and, at her death, it is my will that the sum of \$300 shall be paid to my beloved nephew, Alexander Hamilton.”

Hamilton is one of the complainants in the bill, and is the only legatee, except the residuary legatees, denominated in the will. If he were not here, and here as a petitioner, we might have some trouble about it. But he is here asking the court to dispense with this trustee and his commissions.

Again, and it is under this clause of the will that the controversy before us chiefly arises—

“Item. It is my will, and I direct, that at the death of my said wife, Jane E. Boone, all my real estate as herein devised shall be sold, and, after paying the legacy above mentioned to my said nephew, Alexander Hamilton, or to his heirs, the residue to be divided into two equal parts or moieties, the one-half or moiety to be equally divided between my brothers, Sylvester Boone, Edward D. Boone, and my sisters, Mary Rose Bowling and Sarah N. Hamilton each to have equal shares, and in case of the death of either

of them, then to the heirs of said deceased in the same proportion.

"Item. And it is my will that the other half or moiety of the proceeds of my real estate go to the heirs of my said wife after her death, or to such person or persons as she may devise and bequeath the same to."

Now, that comes very near if it is not quite a fee simple. A life estate is bequeathed to the wife, and upon her death one-half of the remainder to her heirs or to whoever she may appoint by will. It is only the provision directing the sale of the property and the distribution of the proceeds, instead of distributing the *corpus*, that takes from it, as it seems to me, the character of a fee simple.

Now how do we find this estate. All of the debts of the testator have been paid; all of the assets—personal assets—have been collected; a final settlement has been had, and these executors long ago ceased to act, one of them (the widow) died, and the other removed to New York city. They were charged with a joint trust for the purpose of collecting the debts and assets. The collection of the assets and the payment of the debts has been accomplished and the final settlement had. Is not that a dissolution of this joint trust? How is this executor to survive as a trustee of a joint trust where the subject of the trust is dissolved by the very terms of the will? For upon her death this estate goes to the heirs of Mrs. Boone, and this surviving trustee, if he could go on at all, would have to go upon half of this estate and he would have to survive a joint trustee who, under the terms of the will, must be dead before the execution of the trust can take effect.

We think that it was enough to dissolve this trust, as far as it was created a joint trust, when the trustees had settled their account. The widow was not a co-trustee to sell this estate because, by its very terms, it was not to be sold until after her death. Where, then, is there any joint trusteeship of which he is the survivor?

But here is an estate to be sold, and devisees to realize the fruits of the beneficence of their ancestor by will. The

I unite and come into a court of equity asking the appointment of trustees to sell—trustees who are willing to perform the duty without charge—and we are asked to refuse this request because some time in the administration of this will Mr. Clarke acted as a joint trustee, which fact he claims gives him the right to sell and to charge his customary commissions, notwithstanding the protest of every party in interest.

We think the will of the testator puts us under no obligation to keep up the office of this complainant. We think his power as trustee is exhausted, and that common justice to the heirs of this estate requires that it should be sold as suggested in the bill filed by these parties; and that will be the order of the court, reversing the decree below.

Mr. Justice JAMES said:

I should have been very glad to unite with the court in the decree, but for the opinion I have as to the question of his power. It is very desirable that this estate should be promoted without expense. My doubt turns upon the existence of a minor among the distributees.

The will provided that the personalty should be enjoyed by the wife (not the realty) during her life, and subject to her disposal at her death. The land was to go to her for life, and at her death was to be sold. Nobody is specifically named as having the power of sale, and it is a question of the construction of the will whether Mr. Clarke has that power.

The American courts adopt this method of ascertaining whether a person is authorized to make the sale: They look at the whole will, and if they find that there is to be a sale and a distribution of the money proceeds, they hold that to be an act of administration, and that the person who is to make the distribution is to take the step necessary to do it.

Now, by this will, when the wife shall die, this estate is to be converted into personalty, and then the personalty is to be distributed, of course, by the executor, and that, I think, implies a power in him to make the sale.

It is said that this was a joint power. There was only one case cited to us which suggested that the power was given to the widow, and that is an English case, where just such a provision as this was made, viz., that there was to be a sale of the real estate and then a conversion into personalty at the death of the wife. But it was the other trustee-executor that died, and the wife made the sale under that power. It was held that she possessed the power, if she chose to abandon her life estate in the land. Following that decision, we should hold that there was a joint power in this executor and the wife, if she chose to act before his death, and let her life estate go. As a matter of construction, then, I hold, that the power is first, vested in the wife and her co-executor; and if the power is not exercised by them jointly during her life, which could have been done as I have said, by the abandonment of the life estate, then it is vested in the surviving executor.

Of course it is competent for the parties to whom the distribution of the proceeds of sale was to be made, to say they do not want any sale; that they will take the realty itself. But I doubt the right to exercise that power in the present case, because one of the parties is a minor. A guardian *ad litem* has no power. He cannot consent for the minor. The others could all say they would take the land, but they do not propose to take it as such; they are not exercising the power, even if the minor might join with them. They do not propose to set aside the legacy, and instead of taking the proceeds, take the *corpus*. They propose to have the very thing done that the will proposed to have done, but they propose to do it themselves, instead of having this executor do it, as the will provides. But I think the will must be followed, if the estate is to be converted into personalty.

Our attention was called to the statute of Maryland of 1785, which says that where there is no person already designated for this purpose, the court will appoint one. The question first arose, whether that meant somebody specifically named. But the Maryland courts construing their own statutes, say, that if (as a matter of construction

there is an implication from the will that there is a person authorized, then they will not make the appointment. That statute, therefore, does not, in my opinion, apply to this case, because there is a person here whom impliedly the will appoints. It was also said that we have power to administer estates; but that power is a power to administer them according to the will, if there is a will.

My conclusion, then, is based upon these facts: That this is a proposition to convert this realty into personalty, and not a proposition declining to have the conversion made, and to take it as land. The parties insist upon the very thing that the will directs, and if that is to be done, it is to be done as the testator said it should be done. The question is whether he has said so. I construe it that he has, when he says that this sale is to take place after the wife's death. He, by implication, gives the power to the surviving executor, clearly gives it to him, because he is to go right on and distribute the money as a matter of administration. If that is to be done, I think we have no power to change it. I should be very glad if we had, so as to save this charge upon the estate, but I am controlled by the question of our power to do so.

HENRIETTA C. KELLER vs. FRANCIS A. ASHFORD.

EQUITY. No. 6243.

{ Decided February 16, 1885.

{ The CHIEF JUSTICE and Justices MAC ARTHUR and JAMES sitting.

1. A condition introduced in a deed signed only by the grantor that the grantee shall assume the payment of a certain promissory note, secured by a prior deed upon the property conveyed, is not binding upon the grantee unless the conveyance and its conditions are brought to his knowledge and he accepts the property thereunder.
2. Payment of interest on the note and the collection of the rents are not inconsistent with the theory that the grantee took the property under the supposition that it had been transferred to him merely as security for an indebtedness due him, especially when there is no evidence that he had any knowledge of the deed and its condition.

STATEMENT OF THE CASE.

In this case the complainant filed a bill in equity setting forth in substance:

1. That on the 17th day of August, A. D. 1875, one Archie Thompson, being seized in fee of lot numbered five in a subdivision of part of square eight hundred and eighty-nine, by his certain deed of trust of that date, conveyed the said lot of ground, together with its improvements, to one Martin M. Rohrer, in trust to secure his certain note for \$1,500, payable in three years after the date thereof, to the order of Abner B. Kelly, with interest at the rate of ten per cent. per annum until paid.

2. That on the 21st day of February, A. D., 1876, the said Thompson and wife conveyed the same lot above described to one William A. Gordon, in trust to secure his certain note for \$2,000, payable in one year after the date thereof, with interest at the rate of eight per cent. per annum until paid, to the order of Moses Kelly, who endorsed the same to complainant, who is the present owner and holder of said note.

3. That afterwards, to wit, on the first day of January, A. D. 1877, the said Thompson and wife, by deed in fee, conveyed the said lot of ground, with its improvements (to

gether with other lots in the same square), to Francis A. Ashford, the defendant to this bill, subject, however, to certain encumbrances resting thereon, to wit, the two encumbrances hereinbefore mentioned, payment of both of which said defendant Ashford assumed, and for that purpose withheld and reserved from the consideration by him paid for said property so much thereof as was then an equivalent of, or was necessary to cancel and settle the said encumbrances.

4. That said defendant, Ashford, accepted said deed in fee, with its provisions imposing upon him the personal obligation aforesaid to pay said encumbrances, and by virtue thereof entered into possession of the property, and not only collected the rents and profits arising therefrom from the date of said deed until the sale made under the provisions of the first trust, but also paid interest on said first mortgage to the holder thereof, and likewise paid the taxes charged against the same.

5. That complainant, through her agent, made demand on said Ashford for the payment of the note secured as aforesaid and by her held, and that said defendant, whilst he did not deny his liability to pay the same, yet neglected so to do, and now refuses to pay the same.

6. That in pursuance of the provisions of the first trust, the trustee therein named, after previous advertisement, exposed to public sale said lot five, and, on the same day, sold the same to John C. Harkness, trustee, at and for the sum of \$1,700, a sum which was insufficient to satisfy and liquidate the debt secured by said trust, by reason whereof the lien of complainant for the amount of her note for \$2,000, and interest thereon, has become wholly extinct, a deed having passed from said trustee to the purchaser at said sale.

Wherefore complainant, being advised that the acceptance by said Ashford of the said deed in fee, imposing upon him and charging him personally with the payment of the encumbrances resting thereon at the time of his said purchase, and the further fact that he withheld from the pur-

chase money or consideration paid for said property, so much thereof as was then necessary to settle and liquidate the said encumbrances, or was, in the negotiation involved in said transfer in fee, or in any manner credited with an amount equivalent to the said encumbrances by him assumed, was an appropriation by him of said part of said purchase money, or of the amount so credited, as aforesaid, to the use of complainant, and constituted a fund by him held in trust for her benefit, which this court will enforce in her behalf.

The bill concluded with a prayer, that a decree be made in favor of complainant against said Ashford for the amount of the note by her held and secured by the second trust, assumed as aforesaid by said Ashford, together with the interest thereon according to its tenor, besides costs.

Accompanying the bill was the deed from Thompson to Ashford filed as an exhibit. It was an ordinary deed, conveying the property in question, "subject, however, to certain encumbrances now resting thereon, payment of which is assumed by said party of the second part."

The defendant filed his answer, admitting the existence of the first trust and the sale thereunder.

He admitted also the execution of the deed to him, but denied that he ever assumed the payment of the two incumbrances mentioned, or that he for that purpose withheld and reserved from the consideration alleged in the bill to have been paid for the property so much thereof as was the equivalent of, or was then necessary to cancel and settle the said encumbrances.

He denied that he accepted the deed with its provisions imposing upon him the personal obligation to pay said encumbrances, or that he ever accepted said deed in any way, and denied that by virtue of said alleged deed he entered into possession of said property. He admitted collecting the rents of the property, and also that he paid interest on the first encumbrance and taxes, but only under the circumstances hereinafter stated, and not in consequence of his acceptance of said deed with an agreement to pay either of the encumbrances mentioned.

He admitted that demand was made by the plaintiff's solicitor in this suit, Mr. Boarman, upon him for payment of the note, but averred that the demand was made many months after the deed to him was made. He avers that he did deny his liability for the payment of the note, and he informed said solicitor that he did not intend to pay it, and did not intend to keep the property. He denies that he ever in any way admitted, and does not now admit, any liability on his part to plaintiff, nor did said Boarman, in his earlier interviews with this defendant, insist or even suggest that the defendant was personally liable to the plaintiff on the encumbrance alleged to be held by him.

Further answering as to the matters referred to, he averred the truth to be as follows:

That in the month of February, 1877, and a month or more after the said deed had been recorded, Moses Kelly, mentioned in said bill, stated to this defendant that he, Kelly, had had conveyed to this defendant lots on H street, between Seventh and Eighth.

That although there was then an encumbrance on said houses, he (Kelly) thought the equity in said houses was worth something, and that he thought he would sell them in such a way as to pay the defendant some part of his (Kelly's) indebtedness to defendant, and told the defendant that he might collect the rents and apply them to the payment of the said indebtedness to defendant, but that it would be necessary for defendant to pay the interest due to Mr. Harkness on the note held by him which was secured on said property, as he, Harkness, was pushing for it.

This defendant accordingly paid to said Harkness \$150 for interest then due, and in August, 1877, paid said Harkness the further sum of \$75 for interest on said note. The defendant, in the meantime also paid some taxes on said property, which were in arrear, this defendant not knowing until after the said first payments were made that any other encumbrance was on the property. Said Kelly was at the time he told defendant said houses had been conveyed to

defendant, and from thenceforth has been and still is, justly and *bona fide* indebted to defendant for money advanced and loaned to him, in a sum far exceeding the value of said four houses and lots; and defendant, being willing to receive payment of said indebtedness, so far as he could, by collecting the rents from said property and applying the same to the said debt due from Kelly to himself, collected said rents, or so much of them as he was able to collect from February, 1877, to the said sale to Harkness; but the defendant had no understanding or agreement with said Kelly, or with any one, that he would assume or would pay the said encumbrance of \$1,500 on said property, or any other encumbrance thereon. And of the existence of the deed of trust to Gordon or the note secured thereby, the defendant had no knowledge, notice or intimation until eight or ten months after he was informed that the property had been conveyed to him.

That he has never seen, read, or heard read, the said alleged deed to him, or a copy thereof, nor was he ever aware that said alleged deed contained any clause or provision making him, in express terms or otherwise, assume the encumbrances therein, or requiring him to pay the same, until a short time since, when notified that such was the fact.

The only knowledge the defendant had of there being a deed to him or of the terms thereof, until long after the same had been recorded, was what he learned from said Kelly as aforesaid.

That defendant did not and does not know Archie Thompson or his wife, and never had any business relations with them, or either of them, of any kind. That no consideration moved from him to said Thompson or wife for said deed. That if any agreement was made by said Kelly with said Thompson whereby said property should be conveyed to this defendant, and that this defendant should assume and pay said encumbrances, which defendant denies, such agreement was unknown to and unauthorized by this defendant, and this defendant avers that it was not the intention of the said Thompson who executed said deed, or of

said Kelly at whose instance it was prepared, executed and recorded, that this defendant should be made to pay said encumbrances; and the defendant is informed, and so avers, that the said Thompson has hitherto and still refuses to hold this defendant responsible for the payment of plaintiff's claim, or to bring action or suit against this defendant.

The said Thompson, well knowing that the intention was to convey to defendant only the equity in said property without in any way making him personally liable for the debts secured on said property, and such defendant avers the same to be, and he so understood the effect and purpose of the conveyance of said houses when he assumed to collect the same thereof.

When payment of the note alleged to be held by plaintiff was demanded of him, which was prior to the sale to the defendant, defendant refused to pay the same, informing the plaintiff's said solicitor that he knew nothing of the encumbrance represented by said solicitor until long after the said conveyance from Thompson and wife to defendant was recorded, that he did not intend to hold the said property with encumbrances thereon, and offered to convey all his interest therein to plaintiff without any consideration being paid by her therefor; which offer (as defendant has been informed) the plaintiff was willing to accept, but was prevented therefrom by said solicitor, although the interest and rents, as aforesaid, paid by this defendant exceeded the rents collected by him, and he had derived no benefit or profit whatever from said conveyance.

That plaintiff (as defendant is informed), or her said solicitor, attended said sale, or knew that the same was to take place, and knowing, also, that defendant had refused to pay said note, and had informed said solicitor that he, defendant, did not intend to keep said house, said plaintiff neglected to take any means to protect herself against loss by reason of a sacrifice of said house and lot, and allowed the same to be sold at a great sacrifice, the same not bringing more than one-half its value—and this, although plaintiff's said solicitor admitted that she had funds

with which she could have taken up said debt held by Harkness. And the defendant is informed, and so avers, that plaintiff became the holder of said note long before, if at all, said pretended deed to defendant was made.

And further, that if the matters stated do give the plaintiff any cause of complaint against the defendant, the same is triable and determinable at law, and ought not to be inquired of by this court.

A replication was filed; both parties took testimony; and on the hearing the court below dismissed the bill; and the plaintiff appealed to the General Term.

W. D. DAVIDGE and W. W. BOARMAN for plaintiffs:

The deed containing the covenant that the grantee, Ashford, is to assume the payment of the encumbrances is a deed poll.

A deed executed by one party only, but containing an express covenant on the part of the other to perform certain acts, binds the latter, if he accepts the deed, and takes possession under it as effectually as if he had signed it. *Spaulding vs. Hallenbeck*, 3 N. Y., 204; *Trotter vs. Hughes*, 2 Kernan, 78; *Atlantic Dock Co. vs. Leavitt*, 54 N. Y., 35, and cases cited; 1 Jones on Mortg., 610; 33 Mich., 354; *Geo. Rickard vs. Sanderson*, 41 N. Y., 179; *Thorp vs. Keokuk Coal Co.*, 48 N. Y., 253.

"Where the purchaser of the equity of redemption covenants or promises the grantor to pay off an encumbrance upon the land, this duty or obligation enures for the benefit of the mortgagee or creditor in the encumbrance, and he may, in equity, compel such purchaser to respond directly to him." Story's Equity Juris. (10th ed.), sec. 1016, d; *Klapworth vs. Dressler*, 2 Beasley (N. J.), 62.

The doctrine thus declared in the 10th edition of Story's Equity Jurisprudence is sustained, amplified and fortified in the following cases and text books. *Burr vs. Beers* (1861), 24 N. Y., 178; Jones on Mortgages, vol. 1, secs. 748 and 749; 752, 755; *Spence Equity Jurisprudence*, vol. 2, p. 286; *Curtis vs. Tyler*, 9 Paige Ch., 431, 446; *King vs. Whitely*,

10 Paige Ch., 597, and cases cited; Trotter *vs.* Hughes, 12 N. Y., 74; Garnsey *vs.* Rogers, 47 N. Y., 233; Thorp *vs.* Keokuk Coal Co., 48 N. Y., 253; Campbell *vs.* Smith, 71 N. Y., 26; 27 N. J. Eq., 656; 23 N. J. Eq., 150; 4 N. J. Eq., 314, 458; 19 N. J. Eq., 571; 2 Sandf. Ch., 478, 278; Hoff's Appeal, 24 Penn. St., 200; 13 Wright, 51-86; Gregory *vs.* Parker, 3 Merivale, 582; Tomlinson *vs.* Gill, 1 Ambler Ch., 330; 1 Eden, 77; 3 Swanst., 417; Atlantic Dock Co. *vs.* Leavitt, 54 N. Y., 35; 1 Lea (Tenn.), 534; 11 Iowa, 86; Vrooman *vs.* Turner, 69 N. Y., 280; Fisk *vs.* Tolman, 124 Mass., 254; Heid *vs.* Freeland (1879), 2 N. J. Law Journal, 257; Morris' Appeal, Penn. Sup. Ct.; Met. 3, 1879; 19 Abbott's Law Journal, 257; 44 Mich., 10; 57 How. Prac. Rep., 383; 26 Am. Rep., 660; see note, where the whole doctrine is fully discussed; 70 Missouri St., and cases cited.

No candid mind can read the record in this case without being convinced that the defendant, Ashford, had actual knowledge and notice of the clause in the deed holding him liable to pay the encumbrances, and that after such knowledge and notice, he exercised acts of ownership over the property, collected and appropriated to his use the rents and profits, put tenants in possession, and conveyed a portion of the property described in the deed, in fee simple, to one Duncan.

But assuming that he had not actual knowledge or notice of the clause in question, yet having accepted the property under the deed, and exercised dominion over it, the law conclusively presume that he was cognizant of the provisions contained in the deed, and he is estopped from denying that he had knowledge and notice of its contents. See 94 U. S., 405; 5 Munf., 160.

APPLEBY & EDMONSTON for defendant:

The doctrine upon which complainant grounds the relief asked is imported from New York, and though sanctioned in some western States, has never been followed in Maryland or in this District. This doctrine is stated by the reporter *in notis* in Binsse *vs.* Paige, 1 Abbott N. Y. Court of

Appeals Decisions, p. 138, to be as follows: Where the deed in terms binds the grantee to pay a mortgage upon which the grantor is personally liable, the mortgage creditor may hold the grantee liable directly to himself, and he says that the rule has been sustained upon several distinct grounds:

1. Where the grantor, being liable for the debt, takes a security to himself, equity will treat it as enuring for the benefit of the creditor. Hence, in his foreclosure, the creditor may join the grantee and have judgment over against him for a deficiency.

2. In other cases, the principle that the act of the parties in leaving the amount of the mortgage in the purchaser's hands as a rebate from the price—in other words, the fact that the price paid was only the value of the equity of redemption, bound the purchaser in equity to pay the mortgage.

3. In still a third class of cases, the principle is relied on, that where A promises B that he will pay C a debt due from B to C, the promise, if founded on a good consideration moving from B, and if accepted by C, may be enforced by him in an action directly against A. The leading case on this principle is *Lawrence vs. Fox*, 20 N. Y., 268, and that case was first followed in the case of a clause in a deed assuming a mortgage in *Burr vs. Beers*, 24 N. Y., 178.

This decision of *Burr vs. Beers* is the established doctrine of New York. It has been cited and followed so often that it will be necessary to give but few of the cases: 43 N. Y., 411; 47 N. Y., 237; 46 N. Y., 460; 64 Barb., 595; 45 How. P., 38, 179; 54 N. Y., 584; 48 N. Y., 257; 8 Hun, 81, 118, 223, 374; 57 N. Y., 469; 43 How. P., 532; 64 N. Y., 43, 119; 47 N. Y., 688; 3 Daly, 234; 52 How. P., 414; 1 Abb. N. C., 99; 11 Hun, 504; 68 N. Y., 358; 69 N. Y., 282; 70 N. Y., 439; 75 N. Y., 342; 73 N. Y., 211; 57 How. P., 382; 35 Sup. Ct., 179; 15 Hun, 404; 71 N. Y., 28, 519.

Actions at law are now invariably brought because the remedy is plain, adequate and complete. The first ground above mentioned by the reporter in *Binsse vs. Paige*, is no

longer the basis of relief; it was the ground of equitable relief only in foreclosure cases. Judge Denio, in *Burr vs. Beers*, says, where the suit is not for foreclosure of a mortgage, and where the mortgagor is not a party, relief cannot be based upon the doctrine of such cases (cited now by complainant) as *Curtis vs. Tyler*, 9 Paige, 432; *Halsey vs. Reed*, 9 Paige, 446; *King vs. Whitely*, 10 Paige, 465, and other cases referred to by Judge Denio. Where there is not a foreclosure suit, the basis for relief is, says the judge, "the broad principle that if one person make a promise to another for the benefit of a third person, that third person may maintain an action upon the promise." *Burr vs. Beers* was an action at law, and cited as stated *supra*, *Lawrence vs. Fox*. The court showed how the earlier cases in equity turned on the construction of a statute. See, also, *Garnsy vs. Rogers*, 47 N. Y., 237, 238.

As the present suit is not for the foreclosure of a mortgage and as the mortgagor is not a party, the relief asked cannot be claimed on the first ground as mentioned in *Binsse vs. Paige*, and as it is not an action at law, the relief asked must be based on the second ground, and the bill of complaint is bottomed on such a ground, but as heretofore shown, there is not a jot or tittle of evidence to give color to the sworn allegation, that enough of purchase money to pay complainant was withheld by Dr. Ashford from the purchase money and is held in trust for her.

The New York doctrine was never applied either in law or equity to the case of a second mortgagee assuming the encumbrances even where the second mortgage was by a deed absolute in form. *Garnsy vs. Rogers*, 47 N. Y., 233.

The present suit shows that Dr. Ashford was virtually a mortgagee.

If an agreement to pay prior encumbrances be inserted in a deed without the knowledge or consent of the grantee, and without the intent of the grantee to pay the same, whether by mistake, or fraud, or ignorance of its effect in law on the part of the grantor, even where the deed be delivered to and accepted by the grantee, the grantee is not

bound thereby. *Drury vs. Hyde*, 111 U. S., 223; *Dey* ~~vs. Chamberlain~~, 88 N. Y., 658; *Albany Savings* ~~vs. Burdick~~, 87 N. Y., 40; *Kilmer vs. Smith*, ~~vs. Sackett~~, 108 U. S., 132.

In a foreclosure suit where purchaser is sought to be held liable for a deficiency, because of a clause in his deed assuming and agreeing to pay the mortgage, the purchaser never having assented to such a claim, he was held not liable. *Ibid.*, 88 N. Y. And it was held that the failure of grantee to examine the deed was not such negligence as to deprive him of relief. *Ibid.*, 87 N. Y.

A multo fortiori, should it be held that he is not liable where the deed was never delivered nor as such accepted. See *Bull vs. Titsworth*, 29 N. J. Eq., 73; and *Girard Life Ins. and Trust Co. vs. Stewart*, 86 Penn. St., 89.

The rule of *Burr vs. Beers*, following *Lawrence vs. Fox*, has been followed by the U. S. Supreme Court in *Hendrick vs. Lindsay et al.*, 93 U. S., p. 143. The court says: "The right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country," p. 149; and the same court, in *Insurance Company vs. Bailey*, 13 Wall., 620 and 621, said: "Suits in equity, though the Judiciary Act provides, shall not be sustained in either of the courts of the United States in any case where plaintiff has an adequate and complete remedy may be had at law, and the same rule is applicable where the suit is prosecuted in the chancery court of this District." That was a District of Columbia case. The court in the same case, p. 621, says: "Much consideration was given to the construction of this section of the Judiciary Act in the case first referred to, and also to the question whether a party seeking to enforce a legal right could resort to equity in the first instance in a controversy where his remedy at law is complete, and the court, without hesitation, came to the conclusion that he could not, if his remedy at law was as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity."

We submit that the complainant, under the circumstances of **this** case, has no remedy in equity as against the defendant in this District.

Mr. Justice JAMES delivered the opinion of the court.

The parties to this cause have, we think, substantially agreed upon the law of the case; that is to say on the doctrine that if there was no acceptance of the condition introduced in the deed that Ashford as grantee should pay this debt, he was not bound to pay it although it was so specified in the deed.

It is not of any particular interest to go into the details of **the** testimony, but our conclusion after examining it carefully is:

First. That Dr. Ashford was no party at all to the original negotiation. He had no reason to know and no means of **k**nowing that any such condition was introduced, nor did he even know that a conveyance was made to him by **Thompson**. Some time afterward he obtained his information from Moses Kelley, his father-in-law, who was indebted to him, and for whom he was security in some matters.

It should be observed here that the only conflict of testimony is that of Mr. Boarman and Dr. Ashford, and that conflict relates to a matter scarcely material. Dr. Ashford **is** not contradicted by anybody as to the original transaction nor as to the character of his information from Moses **Kelly**. That information was to this effect: That Kelly **t**old him he had given him some lots (he was not even then informed where the title came from) and gave him to understand that he thereby secured him. Kelly did not definitely state that he had given him these lots in payment, and inasmuch as there was no ascertainment between them at that time of the value of the lots, it is not to be presumed that it was in payment of a definite amount; we must, therefore, assume from this conversation that Kelly was intending merely to secure a liability.

Dr. Ashford paid interest on the encumbrances. **It** was perfectly natural that he should do just what any person

who seeks to save his security must do. He collected ~~the~~ rents. It was consistent with the idea of security that ~~he~~ should do that also. But we do not find any transaction ~~on~~ his part accepting the condition in the deed to pay the ~~de~~ ~~bt~~s secured by prior encumbrance.

Just when he obtained his information that there was ~~a~~ condition is not precisely ascertained. We are of opinion, however, that Mr. Boorman is more likely to be mistaken ~~than~~ Dr. Ashford as to having given him the information in the month of October instead of in the spring of the ~~en-~~ ensuing year. But on the whole that is not material for ~~we~~ are satisfied that Dr. Ashford did not accept this condition.

The bill does not proceed upon a promise of ~~Dr.~~ Ashford. For if the plaintiff relies upon a distinct promise, the remedy is an action at law. But ~~the~~ bill is carefully drawn on the theory that Dr. Ashford has made a contract with Thompson by which ~~he~~ reserved a part of the consideration, and that the amount so reserved constitutes a trust in his hands for the benefit of the plaintiff. But the evidence is that Ashford had ~~no~~ contract whatever as to what the consideration was to ~~be~~ with Thompson. The fact, therefore, that there was no ~~un-~~ derstanding as to what the price of the property was to ~~be~~, supports the theory that it was transferred through Kelly's instrumentality by way of security to Dr. Ashford.

The decree below is affirmed.

JOHN B. ALLEY vs. ISAAC S. LYON.

{ Decided February 16, 1885.

{ The CHIEF JUSTICE and Justices MAC ARTHUR and JAMES sitting.

EQUITY. No. 8494.

By an ordinance of the common council of Washington a special tax was laid to defray the costs of certain street improvements. The tax was imposed and levied on all lots and parts of lots bordering on the line of the improvement. By the provisions of the ordinance the manner of assessment was to be as follows: The assessors were to sum up the aggregate cost of the work, and to state the amount due from each lot. This assessment roll was then to be deposited with the register, who was to place it in the hands of the collector, whose duty it then became to place it upon record in the tax ledger, kept in his office, and notify the parties of the amount due from each, within thirty days after receiving the assessment roll. Certain lots bordering upon the line of the improvements were omitted from the assessment roll at the time of making the assessment and of depositing the roll with the register, which was in November, 1870. In October, 1871, the owner of the omitted lots conveyed them to K., a *bona fide* purchaser, who purchased without knowledge of any lien and after searching the assessment rolls and finding no assessment against the lots. One month after his purchase they were entered on the assessment rolls by a memorandum in red ink stating that they had up to this time been omitted. After this entry was made K. conveyed to L. who conveyed to S., and he to the plaintiff, who took and recorded his title some time in April, 1881, long after the entry in red ink had been made. *Held*, That K., having exercised all the diligence required of a *bona fide* purchaser in searching the assessment rolls at the time of his purchase, took the property free and clear of the tax, and that his grantees took the same title although purchasing with knowledge of the later entry.

STATEMENT OF THE CASE.

This was a bill in the nature of a bill of peace.

The bill set forth that complainant was the owner of lots 1 to 12, inclusive, in square 156, in the city of Washington, in fee simple and derived his title from Thomas Young and wife, through deeds from Young to Kilbourn, Kilbourn to Latta, Latta to Sunderland, and Sunderland to Alley.

That lots 1 to 12 were subdivided and Alley conveyed parts thereof to various grantees, who in turn conveyed parts to other parties, and that Alley and those claiming under him have been in actual continuous possession; that Alley is bound to make good the title to the parts conveyed

by him, and therefore brings this suit in his own name and for those claiming title under him.

That Henry Birch, April 1, 1870, set curbstones and paved gutters and sidewalks on the north side of P street between Sixteenth street and Rock creek, under a contract with the corporation of Washington, and that the same was approved November 17, 1870. That the defendant claims that an assessment was made therefor, and on March 9, 1872, four certificates were issued by the Board of Public Works for the tax and assessment amounting to \$2,054.10, which board succeeded on February 21, 1871, to all the rights and duties of the corporation of Washington; that said certificates were assigned by Birch to the defendant for a valuable consideration, and that afterwards a Board of Commissioners having been created, the defendant called upon the collector of taxes to sell said lots to pay said tax and that the sale was made in 1881, at which Lyon became the purchaser thereof, paying for the same with the said certificates and receiving twelve certificates of sale, and that under the same he now claims to be the owner of said lots.

The complainant denies the foregoing claim and states:

That no lawful assessment for said tax was ever made, that an assessment and a record thereof was made for the cost of said improvements upon adjacent property, but not upon these lots and no record of any such assessment was made, kept or found in the books or offices where the same should be, in order to give notice thereof, but on November —, 1871, the pretended assessment, relied upon by said Lyon, was entered and a note was appended as follows:

"This work was done at this date, but on request of the owner, not entered until November, 1871.

"WILLIAM FORSYTH,
"Surveyor, D. C."

That complainant does not know who made this entry, but Thomas Young was at the time owner of said lots, and complainant believes that entry was collusively made by procurement of Birch, but without knowledge of Alley or

is grantors, and after the conveyance to Kilbourn; that Kilbourn and his grantees were innocent purchasers, without notice of said entry, or of said certificates, or of any lien on said property for said improvements, and a search of the records of the corporation of Washington, where said assessment lien should be kept, was made, but no such record was found.

That the page on which the entry was made was a completed record, and when completed was signed by the officers required to certify to the same; that the entry was made over the said signatures after they had ceased to be officers, and the corporation had ceased to exist, and that the assessment was null and void since, as Lyon and Birchell knew.

That by section 37, act of February 21, 1871, the Board of Public Works was created, and had control of street paving and other improvements, and, to defray the cost of such work, were required to assess a reasonable amount, not exceeding one-third of the cost upon the property benefited thereby. That said assessment, if made at all, was made hereafter for the full cost of said improvement.

That on June 20, 1874, the Board of Public Works was abolished, and their authority vested in Commissioners, but neither the Commissioners nor the Board of Public Works made any assessment for said improvements; that the collector of taxes attempted to sell said lots to pay said tax, but was enjoined from so doing by a restraining order, granted in equity cause No. 4450, *Latta vs. District of Columbia and John F. Cook, collector*, which order is still in force, and Lyon, the District and the collector had full notice thereof.

That in 1881 Lyon again applied for a sale of said lots, and said lots were sold by said collector, and Lyon became the purchaser thereof, and paid for the same with said four certificates, and received twelve certificates of sale, notwithstanding said restraining order, and the original certificates were surrendered and cancelled.

Complainant had no knowledge of said sale until after-

wards, and then applied to Lyon to surrender said certificates of sale and discharge said lots from the cloud upon his title created by said certificates, which defendant refused to do.

That said claim creates a cloud upon the title of complainant, which compels him to give bonds of indemnity, and while defendant has not brought actions of ejectment or other possessory actions, he holds said claim as a menace upon said title.

Complainant prays for subpoena and answer; that said assessment be decreed to be void, and said certificates to have been issued without authority of law, and that they create no lien; that said sale be declared to be illegal and void, and the certificates issued thereunder be decreed to be void and no evidence of title, and that Lyon may deliver up the same for cancellation, and that he and his assigns be enjoined from using or setting up the same.

The answer admitted the ownership of Alley, the conveyances by him, and his liability to defend the title, as stated in the bill.

It admitted that Lyon claims title to said lots, and set out the act of the corporation providing for the paving of street north, approved November 2, 1869, the act of Congress of February 23, 1865, giving the corporation power to levy taxes for such improvements; that the corporation, in order to carry into effect this act of Congress, re-enacted the act of May 23, 1853, in relation to paved footways, and the acts of June 10, 1867, and October 28, 1867, providing for the mode of assessing said taxes by a superintendent, and the collection of the same, one-fourth in thirty days, and the remainder in one, two and three years, and the issuing of certificates for the deferred payments. That Henry Birch set the curbs and paved the sidewalks on said street, and that the work was accepted November 17, 1870, and the cost thereof for said lots 1 to 12 was \$2,054.10.

That the assessment therefor was duly made, but not entered until November, 1871; that on November 17, 1871 the collector of taxes entered said assessment on a special

tax ledger in his office, and issued due notice to the owner of said lots.

That on March 9, 1872, four certificates were issued to Birch for the payment of said work, and were meant to be a lien upon said property according to law, and were accepted by him as such in good faith; that afterwards Lyon purchased the same for value without notice of any defect, and no part thereof has ever been paid.

That Lyon afterwards applied for the sale of the lots under said certificates, but was put off until 1881, when the same were sold, and he purchased them with said certificates and received twelve certificates of sale.

That the bill in cause No. 4,450, was filed to enjoin the sale of certain other property in which Lyon had no interest, for certain taxes for work done by George Neitzey, and that an amended bill was filed by Latta, so as to embrace said lots 1 to 11, averring that work to have been done by George Neitzey after the corporation had ceased to exist. A preliminary restraining order was issued, but no hearing was ever had, neither Birch or Lyon were parties, and Lyon never had any knowledge of the same, and there was no note thereof in the office of the collector of taxes.

The answer further denied that the assessment was collusively made, or that it was made with the knowledge of Birch; and that Kilbourn and his grantees were innocent purchasers. It averred that Kilbourn knew that Birch had done the work, and that his grantees could have found the record in the office of the collector of taxes, and they therefore took title with constructive notice thereof.

It denied that the entry by Forsyth, after the sheet had been signed, invalidated the assessment; that the law did not require the signature of the mayor to an assessment, but only that of Forsyth, who was then surveyor as well as superintendent; that the same was made by him as required by law, to the collector of taxes, who entered the same of record against the property. That the act of the corporation created the lien, and all persons were bound to know it. It denied that the law of February, 1871, was applicable

to this assessment, and averred that Alley knew of said assessment at the time of his purchase, and afterwards received \$772.32 for old material put there by Birch, and he is thereby estopped from denying the validity of the lien.

Lyon also filed a cross-bill, setting out the same facts as contained in his answer to the original bill, and in similar form, and prayed that the amount of said certificates be decreed to be a lien on said lots, and that Alley be decreed to pay the same.

The answer to the cross-bill set out the facts stated in the original bill, and referred to the same. It asserted the invalidity of the alleged assessment, the original certificates, the pretended sale, and the twelve certificates of sale, and denied that the said lots are subject to said lien, or that Alley is liable for or should be required to pay the same.

Replications were filed, and for the hearing on the original and cross-bills, the following facts were agreed on by stipulation filed in the cause:

1. That complainant has given bonds of indemnity to said purchasers of portions of said real estate from him to indemnify them and their respective heirs and assigns, from any loss by reason of the matter involved in this suit.

2. That said lots 1 to 12 inclusive, front on the north side of P street north, between Seventeenth and Eighteenth streets west, being on the north side of P street north, between Sixteenth street and Rock creek, and located in what was formerly designated as the first ward of the city of Washington, District of Columbia.

3. On April 1, 1870, the corporation of Washington duly contracted with Henry Birch to set the curbstones and pave the footways and gutters in the first ward of the city of Washington for the year beginning April 1, 1870, and between that date and November 16, 1870, said Birch executed said contract and performed said work on said north P street, bordering upon said lots 1 to 12, and the same was duly accepted by said corporation. The cost of said work bordering upon said lots to be paid said Birch was \$2,054.

4. William Forsyth, at the time said work was done by

said Birch, was the superintendent and inspector of the paving of carriageways and footways under the corporation of Washington, under the act of June 10, 1867, and it was the duty of said Forsyth to enter on a sheet or page of the ward-book of said city the measurement of said work and the cost thereof apportioned against the several lots, from which the collector of taxes entered in the special tax ledger in his office the amount as entered against said lots.

That complainant's Exhibit No. 1, filed with the original bill, is a true copy of the entries in the ward-book relative to the work done by said Birch under said contract. That at the time the same was signed by the mayor, the superintendent of streets, and the commissioner and assistant commissioners of the ward, the entries therein in red ink were not on the same, but that said entries had been withheld therefrom and were not placed thereon until November, 1871, as appears therefrom, at which time said Forsyth was the surveyor of the District of Columbia. That upon the making of the said entries relative to said lots from 1 to 12 in November, 1871, the collector of taxes of the District of Columbia entered the amounts in said special tax ledger in his office, as assessed against said lots from 1 to 12, and served the notice thereof.

5. That, to wit, on March 9, 1872, the four certificates of indebtedness signed by the governor and register of the District of Columbia against said lots from 1 to 12 of which exhibit I. S. L., Nos. 1, 2, 3 and 4, are true copies, were issued and delivered to said Henry Birch who sold and transferred the same to the defendant Lyon for value before maturity.

6. That said Lyon, after said certificates had become due, sought to have said lots sold by the collector of taxes for the payment thereof, and finally said collector of taxes for the District of Columbia did advertise, and, on or about October 5, 1881, did sell said lots from 1 to 12 at public auction for the non-payment of said certificates, at which sale said defendant Lyon became the purchaser of each of said lots, and there was then issued to him, upon the sur-

render by him of said certificates of indebtedness (which have been cancelled) and the payment of a small sum in cash, the twelve certificates of tax sale, true copies of which are filed with the answer herein marked Exhibits I. S. L. Nos. 5 to 16 inclusive.

7. That no part of said sum of \$2,054.10 has ever been paid.

8. That the record and proceedings in said equity cause No. 4450 be considered as in evidence herein. That the collector of taxes upon the service of the restraining order issued in said cause, made no entry or memorandum of the same against lots 1 to 12 in square 156, but by mistake entered the same in his office as applying to lots in square 256.

9. The District of Columbia having made some alteration in the grading and paving of P street in front of said lot the complainant, in 1882, applied for and received from the District the sum of \$772.32, for the appropriation by it of the material put there by the said Birch under his said contract.

10. That there was issued to Henry Birch, on January 13, 1871, fifty-two certificates of paving stock, being for four installments of taxes for cost of said improvement, and which bore interest from November 16, 1870, at ten per cent and which were signed by the mayor of the city of Washington, and which covered the entire amount of taxes for this improvement appearing at that time on the assessment roll.

11. That all acts of Congress and acts or ordinances of the late corporation of Washington having, in the opinion of counsel, any bearing hereon are to be considered as in evidence, and may be read at the hearing.

It was also agreed that Henry Birch, if called as a witness, would testify as stated in the affidavit annexed, and that the same should be read at the hearing as far as competent and relevant.

AFFIDAVIT.

Henry Birch, being duly sworn, deposes and says, that, under and by virtue of public invitation on the part of the mayor of the city of Washington, D. C., for proposals for setting the curbstones, paving the footways, gutters and alleys in the first ward of said city during the year 1870, affiant submitted proposals for doing such work for and within said first ward, and was duly awarded the contract therefor. That in accordance with act of corporation of said city (67 Council, chap. 236), approved November 2, 1869, affiant was directed to set the curbstones and pave the footways and gutters on the north side of P street north, between 16th street west and Rock creek.

Lots 1 to 12, inclusive, square 156, then owned by Thomas Young, were within said first ward, and bordered on the line of this improvement.

That affiant, as contractor, set the curbstones and paved the footway and gutters in front of and abutting said lots 1 to 12, inclusive, square 156, and that this work was done by him and finished in a good and workmanlike manner during November, 1870, under the supervision of the commissioner and two assistant commissioners of improvements of said first ward, and the same was accepted by them and duly measured by William Forsyth.

That during the progress of this work Thomas Young, the then owner of laid lots 1 to 12, square 156, promised in person to pay affiant in full for the improvement of said lots when the work should be finished and measured, provided affiant would deduct ten per centum from the contract price thereof. Affiant agreed to this arrangement, as this requested reduction was less than the usual discount then made by him and other contractors when disposing of the assessment certificates, or scrip issued to them in payment for such work. Moreover, affiant believed such promise would be carried out in good faith, as he had before this time improved lots belonging to said Thomas Young, and had been by him paid cash therefor, after such ten per cent.

discount, at the completion and measurement of this work.

That soon after completing this improvement in front of said lots, Thomas Young sent for affiant to come to his house, but affiant did not go at the time, but went a few days afterwards, when he found Thomas Young had left the city on account of ill health. He, Young, remained absent a considerable time, and upon his return called upon affiant, this being the first time affiant had met him since finishing said work, when affiant was informed by said Thomas Young that the Board of Public Works was running wild in the improvements in that section of the city, and, through fear of these lots becoming further involved in heavy taxes, he had sold them to Hallet Kilbourn, and I must look to him for the tax.

That affiant afterwards applied to the city authorities to have said lots advertised by the collector of the District of Columbia, in list of special taxes in default, at next annual tax sale, and after this made application for the assessment certificates or scrip against these said lots, and received them on or about March 9, 1872; said certificates bore date March 9, 1872, with interest on all at the rate of ten per centum from November 17, 1871, the date of the entry of said assessment on the special tax books of said city, and were signed by H. D. Cooke, governor, and John F. Cook, register. They were four in number aggregating \$2,054.10, and each represented an installment of one-fourth of the whole tax (act corporation approved October 28, 1867). That affiant retained possession and ownership of said certificates until about October, 1873, when he sold them for value to Isaac S. Lyon, of Washington, D. C.

That recently, and since December 1, 1871, the attention of affiant has been called to the entry of the said improvement of lots 1 to 12, square 156, and the measurement thereof, upon the book of improvements for the first ward, by William Forsyth, surveyor District of Columbia, said entry appearing to have been made in November, in 1871, and affiant says in reference thereto, that he has no knowledge when said entry was made; that he made no promise

Thomas Young, or any one for him, nor was there any understanding between affiant and said Thomas Young, directly or indirectly, that the entry of said work (when finished) on the records or special tax books of said city should be suspended for any length of time, by reason of said promise to pay, or for any other reason, nor did ever procure or advise such suspension, if any there was, or receive any compensation therefor.

That affiant told Thomas Young that he would take immediate steps to have ten per cent. bearing scrip issued against said lots unless he paid as promised; that said Thomas Young was a friend of affiant, and expecting to receive from him cash in hand for said work, at more than market value of the scrip issued therefor, affiant trusted him for payment during his, Young's, absence, and until notified by him that he had sold said lots, and in the meantime made no inquiry or gave any attention to what the District of Columbia officials charged with duties connected with such work, had done, or had not done.

HENRY BIRCH.

The court below entered the following decree:

"This cause came on to be heard at the present term, was argued by the counsel for the respective parties, and upon due consideration thereof it appearing to the court that the complainant is not entitled to any relief upon his original bill, and that the defendant is entitled to relief under his cross-bill herein, it is by the court ordered, adjudged and decreed as follows, this 27th day of October, A. D. 1884:

"That the amount of said assessment against said real estate, to wit, lots one, two, three, four, five, six, seven, eight, nine, ten, eleven and twelve, in square numbered one hundred and fifty-six, in the city of Washington, District of Columbia, for which said four certificates were issued to said Henry Birch, viz.: two thousand and fifty-four dollars and ten cents (\$2,054.10), with interest thereon from November 17, 1871, at the rate of ten per centum per annum until October 5, 1881, and thereafter at six per cent. until paid,

be, and the same hereby is, adjudged and decreed to be lien upon said real estate in favor of said Isaac S. Lyon; that said John B. Alley be, and he is hereby, allowed two months from this date within which to redeem said parcels of land, by paying unto said Lyon or his solicitor of record said sum of two thousand and fifty-four dollars and ten cents (\$2,054.10), with interest as aforesaid, upon which being done, said Lyon shall reconvey to said Alley, or his assigns all his right, title, interest and estate in and to said parcels of land in fee-simple, and that said John B. Alley shall pay the costs of this cause, to be taxed by the clerk.

"Should said John B. Alley fail to redeem said real estate as hereinbefore provided, then the same, or so much thereof as may be necessary, shall be sold for the payment of the amount of said lien, and William F. Mattingly is hereby appointed trustee to make said sale. The course of the proceeding shall be as follows: He shall first file in this cause his bond in the usual form in the penal sum of ten thousand dollars, with one or more sureties, to be approved by the court or one of the justices thereof, conditioned for the faithful performance of his duties as such trustee, under this and under any further order or decree that may be passed by the court in this cause. He shall sell said property at public auction, in front of the premises, after at least ten days' notice of the time, place and terms of sale by advertisement in one or more newspapers printed and published in the city of Washington, D. C., which said terms of sale shall be one-third cash and the balance in six and twelve months, with interest from the day of sale. Upon final ratification of any sale hereunder, and full payment of the purchase money, he shall convey the property sold unto the purchaser thereof in fee-simple, free from any interest therein of the parties to this cause, and shall bring the proceeds of sale into court, with a report of his proceedings hereunder under oath, to abide its further order or decree in the premises."

From this decree plaintiff appealed to the General Term

H. H. WELLS for complainant:

The various statutes under which these proceedings were had, and upon which their legality depends, are as follows:

The Board of Aldermen and Common Council of the city of Washington, passed an act on November 2, 1869 (under authority of an act of Congress of February 23, 1865), as follows:

"Be it enacted" * * * "That the mayor be, and he is hereby authorized and requested, to cause the curbstones to be set and the footways and gutters paved on the north side of P street north, between Sixteenth street west and Rock Creek; the work to be contracted for and executed in the manner and under the superintendence provided by law; and to defray the expenses of said improvement, a special tax, equal to the cost thereof, is hereby imposed and levied on all lots or parts of lots bordering on the line of the improvement; the said tax to be assessed and collected in conformity with the provisions of the act approved October 12, 1865." 67 Council, p. 116, Corp. Laws.

The act of October 12, 1865, referred to in the act quoted above (see page 3, 63 Council), recites the act of Congress of February 23, 1865, which gave the corporation power to levy taxes in particular wards, &c., and extends the provisions of the acts of May 23 and May 24, 1853, to special improvements thereafter made, and provides, that local improvements, unless otherwise provided for, shall be levied, assessed, collected and paid in the same manner as is provided by the last two acts.

The material parts of the two acts referred to, May 23, 1853 (Webb's Digest, page 155), and the act of May 24, 1853 (Webb's Digest, page 232), are as follows:

The first of the acts provides for proposals for setting curbs, petition for the improvement and plan of the property, time within which the improvement is to be made, and for the appointment of two assistant commissioners.

The assistant commissioners are provided for under the 5th section, which with the 6th section contains the only provisions important to be considered in this connection,

for they relate to the assessment. The substantial requirement of these sections is that, when the work is done, the commissioner of improvements shall deposit a statement with the register showing the cost of the work, a list of the persons from whom the tax is due, and the amount due from each person, and the register shall place such list of persons with the amount of tax in the hands of the collector, who shall give notice in writing to each person, and of the amount of tax claimed from each.

The act of May 24, 1853, provided for the appointment of commissioner of improvements, who, with the consent of the mayor, was to contract for improvements, and the assistant commissioners were to expend the appropriation, superintend the paving, but no contract should be made without the certificate of the mayor.

None of the provisions of that act are important in connection with this case.

The next act, that of June 10, 1867 (Webb's Digest, p. 467), is however important, for, after providing for the appointment of a superintendent and inspector of improvements, who is to prepare plats and fix grades, and to superintend paving of footways, the 5th and 6th sections of that act declare :

5. "All sewers, carriageways and footways, constructed under the provisions of this act, shall be under the exclusive control of the said superintendent and inspector herein provided for, with two assistant commissioners, to be appointed by the mayor, who shall be from among the persons residing on the line of the proposed improvement, or as near thereto as possible, and the mayor shall not pay any bills for work under contract until the same shall have been approved and the bills therefor signed by the superintendent and inspector, commissioner of the ward, and at least one of the assistant commissioners."

6. "The said superintendent and inspector shall also be charged with the duty of making all assessments on lots or parts of lots bordering on any street, alley or avenue which shall have been paved."

The last act on the subject, that of October 28, 1867, is as follows:

"Be it enacted," * * * "That from and after the passage of this act, all taxes assessed on private property for the construction of sewers, the paving of carriageways in avenues or streets, and for the laying of foot-pavements and gutters, curbing and paving alleys, shall be collected as follows: one-fourth of such assessment within thirty days after the service of the notice by the collector of taxes, and the remaining three-fourths in three equal annual payments, for which deferred payments it shall be the duty of the mayor to issue certificates of indebtedness, bearing interest at the rate of ten per centum per annum;" and the second section repeals all inconsistent acts.

On the 1st of April, 1870, Henry Birch contracted to make this improvement, and it is claimed that the work was done and approved on or before November 17, 1870, for which improvement an assessment was in fact made, which assessment was duly entered in the record book, and was signed by the then mayor, superintendent, commissioner, and the assistant commissioner, who certified to and approved the same, and a cancelling line was drawn through the page to show where the assessment stopped.

But lots 1 to 12 inclusive, were not upon this assessment and were not assessed, neither did the sheet or assessment referred to contain either the names of the person or persons owning these lots nor the lots themselves, nor the amount of tax claimed upon the lots, or of the owners.

On the 13th day of January, 1871, there was issued to Henry Birch fifty-two certificates of paving stock for the four installments, being for the entire amount claimed on all the property then on the assessment roll, which were signed by the proper officers of the corporation of Washington, but did not refer to either of the lots from 1 to 12 inclusive.

By the act of February 21, 1871, a new form of government was instituted, and the Board of Public Works succeeded to the powers and duties in respect to special taxes

of the corporation of Washington, and on the 1st of June 1871, Emery, the mayor, Forsyth, superintendent and inspector, and the commissioner and assistant commissioners of improvements, who had before signed the assessment roll ceased to hold office or to have any official power in respect to assessing taxes.

By section 37, act of February 21, 1871, the method of assessing and collecting the cost of special improvement was changed. The Board of Public Works, which was given entire charge of the subject, was required to assess upon the property adjoining and to be specially benefited by the improvement, "a reasonable portion of the cost of improvement not exceeding one-third," while under the old statute the entire cost was to be assessed on the property.

But in November, 1871, after the corporation of Washington had ceased, and its mayor and superintendent and inspector had gone out of office, and the assessment had been completed and the work paid for by the certificates as mentioned above, the cancelling line that marked the end of the list of the owners, and of the lots assessed, and of the assessment, was partially erased and in the space thus made, description of lots from 1 to 12 inclusive, was entered and the sum of \$2,050 inserted against said lots, and an explanatory of such insertion, the following was written on said sheet:

"This work was done at this date, but by the request of the owner, not entered until November, 1871.

"WILLIAM FORSYTH,
"Surveyor, D. C."

Which interlineations constituted the only assessment ever made upon said lots.

The Thomas Young mentioned in the Forsyth memorandum remained the owner of these lots until he conveyed them to Kilbourn, on October 2, 1871, at which time there was no entry of any assessment, and Kilbourn purchased without notice, and was therefore an innocent purchaser.

On the 9th of March, 1872, four certificates were issued to

Henry Birch, as and for the cost and tax for making the improvement in question in front of lots 1 to 12 inclusive, which certificates gave the 17th of November, 1871, as the date from which interest was to be computed, and the only authority for the issuance of these certificates was the interlineation made in the ward book, as before stated.

The Board of Public Works was abolished June 20, 1874, but during its lifetime, to wit, from June 1, 1871, to June 20, 1874, it caused no assessment to be made, and the Commissioners of the District of Columbia, who succeeded, on the 20th of June, 1874, to the rights and duties of the Board of Public Works, made no assessment on said lots for such improvement, but on July 29th, 1875, Birch having assigned said four last named certificates to the defendant, Lyon, the District of Columbia and John F. Cook, collector, having advertised said lots for sale as delinquent, James M. Latta, who was then the owner of said lots, filed his bill in equity cause No. 4450, against the District of Columbia and Cook, collector, to enjoin the sale thereof, and a restraining order was granted on that day, which still continues in force.

On the 5th of October, 1881, the District of Columbia and John F. Cook, at the request of the defendant, Lyon, undertook to sell these lots, and Lyon bid in the said lots and received twelve certificates of sale, and paid for the same with his said four certificates, this sale being in violation of the restraining order above mentioned.

These certificates also bear interest as from November 17, 1871.

The bill in this case is in the nature of a bill of peace; it alleges the possession and title of the complainant, and asserts that Lyon claims some right or title in said lots, and that his claim throws a cloud and encumbrance upon the title of the complainant and his grantees.

Alley and his grantees are in adverse possession; they have a title in fee simple; the parties are numerous, and, therefore, there is no adequate remedy at law, but the whole question can be settled by one issue in equity, and this is,

therefore, the proper remedy. 3 Johns., 566; 6 Johns. Ch., 497; 8 Cr., 462; 3 Daniel's Ch. Prac., 1779; 1 McAllister, 113; Hemp., 692; 1 Black, 352.

This was the proper form of action, and though it prayed as an equitable and appropriate relief that the defendant be required to release his claim of title, the bill did not tender part payment, nor any payment, because, according to the theory of the complainant, there was no lawful assessment, no legal tax, and no part of the tax claimed was due any more than the whole of it.

The general doctrine as to the necessity of a tender in cases similar to this, is stated as strongly as anywhere else in State Railroad Tax Cases, 92 U. S., 575; at page 617, it is said: "Before complainants seek the aid of the court for relief from excessive tax they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them. * * * It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due or what can be seen to be due on the face of the bill." And see *National Bank vs. Kimball*, 103 U. S., 732; *Cooley on Taxation*, 537; *Clement vs. Everest*, 29 Mich., 19; 7 Sawyer, 355; 32 Iowa, 271; Iowa, 144; 46 Iowa, 150; 37 Iowa, 452; 41 Mich., 128; 87 Ill., 442.

These are cases of the same general character, and are not materially different in their principles from 92 U. S., 575.

The theory of the present case is that nothing is due; there was no legal assessment; there was no equitable obligation to pay anything. The complainant had bought the property, paying a full price, without any actual or constructive notice of any tax; no assessment or notice of the tax was in the tax office or upon the record where by law it was required to be placed, and the principle governing this class of cases is:

"Each step from the assessment of the land to the delivery of the deed must be taken; and in a controversy as to the title must be established by proof. * * * The general

eral doctrine is beyond question that the deed, until the prerequisites of the tax laws are established, is a nullity. *Burroughs on Taxation*, 332, and cases; *Blackwell on Tax Titles*, 33, 34, 35, and cases; 4 Wh., 77; 18 H., 137; 2 Tenn., 372; 10 Mass., 17; 11 Mass., 220; 13 Mass., 282; 15 Mass., 144; 5 Conn., 190; 7 Conn., 550; 14 Ill., 223; 43 Ala., 633.

These cases are selected from the multitude which embrace almost every variety of conceivable defects.

In *Thatcher vs. Powell*, 6 Wh., 119, the court say, the execution by a public officer of a power to sell lands for the non-payment of taxes must be in strict pursuance of the law under which it is made, or no title is conveyed.

In *Mason vs. Fearson*, 9 How., 248, which was a case where at the sale more than enough lots were bid off to satisfy the tax, at page 260, the court says: "It is well settled that where a tax title is to be made out by a party. * * * It must be done in all material particulars fully, clearly. * * * In the language of some of the cases, it must be done 'strictly,' 'exactly,' 'with great strictness.'"

Where a statute requires a series of acts to be performed before the owners of property are properly chargeable with the tax, such acts are conditions precedent to the exercise of the power to levy the tax and all the requirements of the statute must be complied with or the tax cannot be collected. *Jewes vs. Reis*, 40 Cal., 255; *Hilliard's Law of Taxation*, p. 107, sec. 34; *Games vs. Stiles*, 14 Pet., 326; *Burrows on Taxation*, 203; *Powell vs. Madison*, 21 Ind., 535; *Kimball vs. Merchants' S. L. & T. Co.*, 89 Ill., 611.

If the tax is not assessed within the time designated by law the assessment is void. *Billings vs. Dutton*, 15 Ill., 15; *Marsh vs. Chestnut*, 14 Ill., 223; *Mitchum vs. McInnis*, 60 Miss., 945; *Marsh vs. Supervisors*, 42 Wis., 502.

In *King vs. The District, Mac A. & Mackey*, 36, this court said:

"While it is doubtless the duty of the citizen to pay all taxes legally assessed upon him for the support of the government, yet the validity of proceedings taking his land

against his will, in discharge of his taxes, depends upon no consideration of equity but upon a strict compliance on the part of municipal officers, with the regulations previously prescribed by statute for the double purpose of securing the payment of the tax and of protecting the citizen against unnecessary sacrifice of his property."

And see also, *Holt's Heirs vs. Hemphill's Lessees*, 3 Ohio, 233; *Stead's Ex'rs vs. Carnes*, 4 Cran., 412; *Chandler vs. Spear*, 22 Vt., 388, citing *Spear vs. Ditty*, 9 Vt., 282; *Bel-laws vs. Elliott*, 12 Vt., 569; *Sumner vs. Sherman*, 13 Vt., 909; *Carpenter vs. Sawyer*, 17 Vt., 122.

In *Kneeland vs. City of Milwaukee*, 18 Wis., 411, an act authorizing the laying of a sewer and required that a plan thereof should first be made and filed, which was not done. But the sewer was constructed and an assessment made. The court held that the making of the plan was a condition precedent, citing *Merrick vs. LaCrosse*, 17 Wis., 442, and says:

"It is a general rule when measures are authorized by statute in derogation of the common law which may result in divesting the title of one person to land and transferring it to another, that every requisite having the semblance of benefit to the owner must be strictly complied with." And cites *Atkins vs. Kenna*, 20 Wend., 241.

The provisions of the statute as to the form of warrants and tax lists and the place where lists shall be deposited are intended for the benefit of the tax payer. *Sandwich vs. Fish*, 2d Gray, 298.

The law (Secs. 5 and 6, Act of May 23, 1853) under which this tax was authorized, required, as we have before seen, that the commissioner of improvements shall deposit a statement with the register showing the cost of the work, a list of the persons from whom the tax was due, and the amount due from each person; and the register shall place such list of persons, with the amount of tax, in the hands of the collector, who shall give notice in writing to each person of the amount of tax claimed from each.

This provision of the statute is specific, precise and man-

datory. Every one of these requirements, in the language of the Supreme Court, "are intended for the protection of the citizens," and the omission of any one of them would render the tax sale void, for the list deposited with the register did not contain these lots from 1 to 12 inclusive. So, as to them, there was no statement of the cost, no list of the persons from whom the tax was due, no amount stated to be due from any person, and no such list as to them was placed in the hands of the collector.

If the case stopped here, of course it would be conceded that the whole proceeding as to these lots was null and void *ab initio*; but it is said that these commissioners, after they had made out their lists, which did not contain this property, and after the lists as made out had been signed, completed and filed, and certificates issued to the contractor in payment of all the tax mentioned therein, might proceed to alter, amend and add to said list other property not before included, and the names of persons not found on such completed list. Not only so, but they could make these additions and alterations, not only at any time after they had gone out of office, but at any time during their natural lives. This proposition seems as extreme and unreasonable as to be beyond the range of argument.

It will be remembered that these alterations of the list were made nearly a year after the list was completed; after the mayor, commissioner and assistant commissioner, as superintendent and inspector, who were required to sign the list and had in fact signed it, had gone out of office, and after the form of government under which the assessment was to be made had ceased, and after other officers had been empowered by law, under new methods, to make such assessments; and it will be remembered, too, that these additions and such alterations were subsequently made, not by said mayor, commissioner and assistant commissioners and said superintendent and inspector, or with the consent of said four officers, but only by Wm. Forsyth, without any consent of the other officers, and after he had ceased to be such superintendent and inspector.

Section 6, act of June 10, 1867, required that the assessment should be made by the superintendent and inspector. If there had been a change in the incumbent of that office Forsyth being removed and a new one appointed, after such making of the assessment and filing thereof, but before the unauthorized and illegal alteration, which of the two could make such alteration? Certainly not both; and surely we should suppose it would be the incumbent of the office, because the power and duty attached to the office and not the person.

"The assessor acts under a special and limited authority conferred by law and not by the owner of the estate. He is the mere instrument to pass the title. The proceeding is construed strictly, and the power must be strictly pursued in every particular. Every prerequisite to the power to sell the estate must precede its exercise." *Davis vs. Farnes*, 26 Texas, 296; *Yunda vs. Wheeler*, 9 Texas, 408; *Robson vs. Osburn*, 13 Texas, 298; *Wafford vs. McKinney*, 23 Texas, 36.

To justify the act of Forsyth complained of, we are compelled to assume that he could have made this entry at any time; that he could have kept, at the request of the owner or other party, or by agreement, the assessment off the record for an unlimited period, and implies his power to alter in a vital particular, a completed instrument and record duly signed; propositions that are against the whole current of authority.

In *Hartwell vs. Littleton*, 13 Pick., 229, the court say: "Of course an amendment could not be made by one who was no longer in office, as under such circumstances it would not be an official act."

Mr. Cooley says: "Corrections cannot be made by intentment, unless the necessary facts appear either in the record as actually made, or in official documents on file, from which the record should have been drawn up. Courts cannot imply facts which are not recited anywhere in the official proceeding." *Cooley on Taxation*, 234.

No amendment can make valid a tax sale that was void for want of a proper description of the land in the assess-

ment and subsequent proceedings. *Cooley on Taxation*, 242; *People vs. Ward*, 105 Ill., 620; *O'Connor vs. Mullen*, 11 Ill., 57-116; *Langdon vs. Poor*, 20 Vt., 13; *Judevine vs. Jackson*, 18 Vt., 470; *Atkins vs. Hinman*, 2 Gilman, 451; *Blackwell on Tax Title*, 359-362, and cases; *Blight vs. Barks*, 6 Monroe, 206; *Blight vs. Atwell*, 7 Monroe, 268.

This extraordinary and illegal method opened the door to unlimited frauds, for when Alley's grantor bought there was no record, note or memorandum of this tax in the tax office or the records thereof from which he could learn of the encumbrance, and it was a fraud upon his rights to allow an assessment to be subsequently made and put upon the record, and that to be done by the District through its officers in confederation with Young, the then owner of the property, who, by the device, relieved himself from the tax and undertook to transfer it to his grantee without notice.

The position of Birch, by whom the work was done, and to whom the certificates were finally issued, was this: He, by taking Young for the price, and withholding the property from assessment, was estopped from calling upon the subsequent purchaser without notice, and whatever fraud he was chargeable with, Lyon is also charged with; for at the time he purchased the certificates, the record disclosed the fact that the property had thus been illegally withheld from assessment.

If there had been an accidental omission of property from the tax list without the fault of Birch whereby he might lose some part of the contract price for making the improvement, the remedy would have been convenient and adequate, for if the tax was a legal charge, an application might have been made for an assessment, such as is provided for by the 13th section of the act of March 3, 1883: "If the assessor of the District shall learn that any property liable to taxation has been omitted from the assessment for any previous year or years or has been so assessed that the assessment was void, it shall be his duty to re-assess," on the assumption that the property was originally chargeable

for the improvement; and while the amount could not be collected by a forced sale, it could be by a proper proceeding in court; but in no event could this extraordinary method be resorted to.

WILLIAM F. MATTINGLY for defendant :

The act of the 67th Council, ch. 236, approved November 2, 1869, authorized the work to be done, and *imposed* and *levied* a tax to pay for it on all lots bordering on the line of the improvement. The work was done according to contract and has never been paid for.

The lien is from the levy or time of ordering the work, although the amount is not ascertained until afterwards. *Blakie vs. Hodson*, 117 Mass., 181; *Carr vs. Dooley*, 119 Mass., 294; 40 N. Y., 513; *Jones vs. Boston*, 104 Mass., 411.

The tax was properly assessed on these lots, notwithstanding the delay in entering the assessment. *Mills vs. Gleason*, 11 Wis., 515.

The tax was assessed on the books in the office of the collector of taxes against these lots at the time of the purchase by Alley and he had constructive knowledge of it.

He who seeks equity must do equity, and in cases of this kind a complainant seeking the aid of a court of equity must pay the amount of tax and interest before the burden will be removed from his property. High on Inj., sec. 497; *Morrison vs. Huskin*, 32 Iowa, 278; *Dudley vs. Little*, 2 Hammond, 504; *Barrett vs. Cline*, 60 Ill., 205; *Stewart vs. Mayor, etc.*, 54 Md., 454; *Phelps vs. Harding*, 87 Ill., 442; *State R. R. Tax Cases*, 2 Otto, 616.

The lien of this tax was created by the law authorizing the work to be done and nothing has since transpired to remove the lien.

The equitable doctrine of a purchaser with notice standing in the shoes of a prior vendor without notice, has no application to liens for taxes created by law. *Cooley on Taxation*; *Black. on Tax Sales*.

Mr. Justice MAC ARTHUR delivered the opinion of the court.

A majority of the court who heard the argument have come to the conclusion that the decree made in this case ought to be reversed.

The bill is filed for the purpose of removing a cloud upon the title to real estate of the plaintiff, created by a special improvement tax title.

Mr. Alley became the purchaser of these lots, and has filed a bill to remove the cloud of which he complains. The stated statement of counsel collates the statutes which relate to the imposition of taxes for special improvements, would take some time to analyze these statutes, and perhaps it is unnecessary to do so, because we think a very brief statement of the system can be made without referring to them in detail.

The work was performed in 1870, under the act of the common council of the corporation of Washington, that was passed on the 2d of November, 1869; and it is conceded that that ordinance was in conformity to an act of Congress authorizing the common council to make local improvements and to lay and collect taxes upon the lots upon the line of the street.

At that time the first step in the process was an ordinance of the common council, and the ordinance in the present case designated the place where the improvement was to be made, on P street, on the north side, between Sixteenth street and Rock Creek. To defray the expenses, a special tax equal to the amount of the cost was thereby levied upon the lots bordering upon the improvement. The ordinance also provided that that tax should be assessed and collected in conformity with the provisions of the act of October 12, 1865.

Other ordinances provided for the appointment of a superintendent and inspector of streets, who was to make plats, determine the grades, superintend the work, and make assessments on the lots to defray the cost of the work.

The ordinances required the appointment by the mayor

of two assistant commissioners, to be selected from the line of the improvement, and they were to supervise, with the superintendent and inspector, and control the work as it progressed, and the mayor was to pay no bills for this work unless they were signed by these commissioners and by the superintendent.

When the work was completed, the inspector and superintendent was charged with the duty, as I have stated, of making the assessment, of summing up the aggregate expense of the work, of stating the amount due from each person, and he was required to deposit this roll of assessment with the register (an officer which no longer exists), and the register was then to put it into the hands of the collector. It then became the duty of the collector to enter it upon what was called a tax ledger, kept in his office, and notify the parties of the amount due from each within thirty days.

This appears to have been the process at that period of levying taxes for such improvements.

This work was authorized in November, 1869, and the act which authorized it laid and levied the tax. The contract was given to Mr. Birch, who was a professional paver, to pave and curb between Sixteenth street and Rock Creek, on the north side of P street north. He entered upon the execution of his contract, and completed it in November following. Mr. William Forsyth was the superintendent and inspector; he prepared the statement for assessment, which I have already described, upon the conclusion of the work, and deposited it with the proper officer, the register, who placed it in the hands of the collector; it was then entered on the tax ledger, and presumably he gave the notices and collected the tax.

Now, the lots in question were omitted from that assessment.

This assessment bore the signatures of the street inspectors, and of the mayor. It bears date on the 17th of November, 1870. The lots are specified, so much for paving, so much for grading, so much for curbing, and so much for

uttering. Each of these items being in a separate column, and then the total amount is carried out.

It is executed by William Forsyth, superintendent of streets, by Hiram Brown, D. M. Davis and Robert Armor, assistant commissioners, and on the corner it is approved by M. G. Emery, mayor.

The lots in question are upon the line of this improvement, and they are numbered from one to twelve, between eventeenth and Eighteenth streets, on the north side of ' street, and it is admitted that they were not entered upon his statement at that time nor until a year afterwards. 'here is a memorandum which embraces lots from one to welve in red ink, and which reads:

"This work was done at this date, but at request of the wner not entered until November 17, 1871."

And that is signed, William Forsyth, surveyor.

Between the completion of the work and the execution of this memorandum, public events of considerable importance in the District had occurred. The old corporation had been extinguished, and a District government had been established with new officers, and with provisions in regard to improvements that varied somewhat from those that had preceded it.

It is of vital importance in this case to bear in mind that, at the time the sheet was deposited with the register, there was no mention of these lots.

It appears that Thomas Young, at the time of the improvement, was the owner of the property. He entered into an agreement with the contractor to pay him ninety per cent. of the contract price, and the inducement was that that was more than the contractor would have realized from the sale of the certificates in the market.

About this arrangement there appears to be no dispute. But from the entry it would appear that the owner had requested the superintendent not to make it, and that inference is very natural in view of the arrangement to pay for the work.

Mr. Young, becoming somewhat alarmed at the extensive

improvements that were then going on, withdrew from the agreement and notified the contractor that he would not stand by it. In the meantime, on the 12th of October, 1871 Young conveyed the lots to Hallett Kilbourn. That was just one month before the entry was made in red lines.

The complainant states in his bill that Kilbourn searched the assessment rolls and found that these lots were not assessed, that he had no knowledge of any lien resting upon the property, and that the purchaser was a *bona fide* purchaser without notice. Kilbourn then conveyed to Latta, Latta conveyed to Sunderland, and Sunderland to plaintiff who took and recorded his title some time in April, 1881, long, however, after the entry in the red ink had been made. But he claims that he took the title unaffected by this assessment, just as Kilbourn did.

And the question is whether the lien to defray the expense of the improvement attached itself in such a way as to affect Mr. Kilbourn with notice.

I have stated that the ordinance of the common council authorizing this work to be done, levied and assessed a tax to defray its expense, and we are all agreed that that constituted a lien upon the property.

It is, however, provided in the act, that the tax shall be assessed and collected in conformity with the provisions of the acts which I have already enumerated. Until this is done it is very clear that the lien created by the act authorizing the work is inchoate, and that it does not become complete and absolute until the assessment or statement is made by the proper officer.

How can that affect this case? The assessment for the work had been made; it had been made by the proper officer, and there is no fault found with it. That assessment does not exhibit the lots in question as being subject to any lien or to any assessment, and it is stated in the bill that Kilbourn purchased without any constructive or actual notice of the lien of the assessment.

It is to be remembered that the assessments of these lots were not omitted by mistake, or through ignorance or from

negligence, but their omission appears to have been intentional and at the request of the party then owning the lots.

Now, can it be possible that the municipal authorities can withhold purposely an assessment at the request of anybody, to the injury of a *bona fide* purchaser? We think not. We are of opinion that Kilbourn having exercised all the diligence which is required of a *bona fide* purchaser, takes his title free and clear of this tax.

The law requires that a record shall be made of the assessment and it designates the place where this record is to be found. There is no other place to which parties can resort for information. Having exhausted all the information that the law puts them in possession of, we think they have met the obligations required of an honest purchaser.

A position was taken that the party should be required to pay the tax due before he can ask this court to remove the cloud upon his title. That is a very well established doctrine both in this court and in the Supreme Court of the United States in a proper case, and if Mr. Young, the owner of the property, were here seeking to get rid of this tax and this cloud, on account of the fact that the assessment was not made properly, we should require him to come into court with the amount of the tax before granting him any relief.

But Kilbourn does not stand in that position at all. He is a *bona fide* purchaser, and it is on account of this assessment having been intentionally withheld from the assessment roll that he made the purchase and paid the value of the land.

If this be the case, and I do not see that there is any escape from it, he has paid this tax once in the purchase of the land, and it would be inequitable to call upon him to pay it again.

We do not think, therefore, that this is a case in which that doctrine can be applied.

We are, also, of opinion that Mr. Alley takes all the title that Kilbourn did. It appears that Mr. Alley received from the District government \$788, less or more, as a drawback for material that had been used in this improvement, after

he became the owner of the land, and it is said that he is estopped by that circumstance.

While we are not disposed to adjudicate to whom the \$788 belongs, we doubt very much if it belongs to Mr. Alley. The District of Columbia, who paid it, is not a party to this proceeding. If the District were here we would probably be inclined to direct him to return it. But we do not think that that affects his title to this property at all. That is a matter in controversy between the parties who may be entitled to it, and so we think our decision ought not to be influenced by it.

For these reasons, the court are of opinion that the decree below is erroneous and should be reversed.

Mr. Justice JAMES, dissenting, said:

I have some difficulty, on certain points, in concurring in the opinion of the majority, and I shall state my reasons very briefly.

Congress gave to the corporation of Washington the power to order these improvements and to charge them upon the land. Under that power they passed this act:

"That the mayor be, and he is hereby authorized and requested to cause the curbstones to be set, and the footways and gutters to be paved, on the north side of P street north, between 16th street west and Rock creek; the work to be contracted for and executed in the manner and under the superintendence provided by law; and to defray the expenses of said improvement, a special tax equal to the cost thereof is hereby imposed and levied on all lots or parts of lots bordering on the line of the improvement; the said tax to be assessed and collected in conformity with the provisions of the act approved October 12, 1865."

We find in the act of 1865 a reference to earlier acts, and the whole system is laid out plainly.

Now, I think we have agreed as to the effect of this statute, but I lay more emphasis on it than my brethren. The effect of this ordinance was to charge this property with a burden. The assessment was for the ascertainment of the quota of

each lot, but the charge was there perfect and absolute. I lay that down more strongly than my brethren. The legal liability of the lot for the tax, the amount of which was to be ascertained, was perfect and cannot be moved by any omissions.

What then was the position of this purchaser when he took these lots? He found there was no assessment, but he was warned that the lots were liable. There was perfect evidence that the lots were liable, and he had no knowledge that that liability had been discharged, nor any right to presume that it had been. I am not aware that there is any presumption of law, after you prove an indebtedness, that it is paid. You prove first the debt, and there is a presumption of its continuance.

Then this purchaser had knowledge through this ordinance that there was absolutely a charge on this property. It is true it nowhere appeared that the proportion of each lot had been assessed upon it; but it did appear that the lot was under a charge for whatever its proportion might be.

We find certain proceedings taken afterwards by the claimant of this charge, the owner of this property, which are held to be irregular. There was no assessment on these lots at the time when the assessment was made on the other fifteen lots in the same square. It is said that the assignor of the present defendant had something to do with keeping it off the record. We have been furnished with a stipulation in which it appears as one of the facts, that that was done at the request of Mr. Young, the owner of the lots. It is not asserted that it was done by Mr. Birch. Birch says—and I do not find him contradicted anywhere—that he made no stipulation (no bargain, is his language) for any specific time. It is only a piece of guess work, from the general language of his affidavit, as to whether he made any contract to keep it off. The evidence is, that the owner of the lots asked the superintendent and inspector, or perhaps went to the register, and asked him to keep it off the assessment list, and it was kept off.

But all the world was advised that there was a charge on

this property, and they had no information that that charge had been taken off.

That charge, whether ascertained by assessment or not, has been assigned to this defendant, and the plaintiff comes here asking relief against the defendant, who owns a charge on this property. The amount was not ascertained by the assessment, but it was a charge nevertheless. It was not what I call inchoate, though my brethren so view it. It was a charge the exact amount of which was not yet ascertained, but, nevertheless, a perfect charge. And in this bill he asks for relief against a man who has an ascertainable charge upon his property, without offering in any way to settle with him.

Now, the defendant is not entitled himself, as I should say, to the benefits of a certificate of indebtedness bearing ten per cent., but I should require the party to pay the defendant the charge that he owns on the plaintiff's property, with six per cent. interest, before I would give him any relief. The amount can be ascertained, and it is fairly ascertained here. It is the balance of the whole, because after the equity of the other fifteen lots is ascertained, we know exactly what it is. It is \$2,045 of original liability. I do not see why the plaintiff is entitled, when we have got through his whole matter here, to say that just because this is a cloud, and because he can demonstrate that the legal title claimed by the defendant ought to be brushed away, that he will have that done first, and leave this very defendant afterwards to take steps for the ascertainment of his rights when we know now what they are.

These are the grounds upon which I am compelled to dissent from the conclusion of my colleagues. If the plaintiff will pay this debt he will be entitled to relief, because, I think, this title by purchase cannot stand. But I do not think we ought to help a man, who is in debt more or less to the very party against whom he is asking relief, unless he offers to pay what is justly due.

IN RE WILLIAM M. BRYANT.

CRIMINAL DOCKET. No. 14,824.

{ Decided February 16, 1885. }

{ Justices MAC ARTHUR, HAGNER and JAMES sitting. }

1. A person cannot be secluded *in invita* as an insane person until by due process of law he has been found to be insane. "Due process of law" in this case means the finding of the fact of insanity by a jury of inquiry.
2. There is nothing in the Revised Statutes of the United States regulating the Government Hospital for the Insane which contemplates compulsory seclusion without due process of law. The statute only opens the doors of that institution to those who have been judicially found to be insane.
3. The act of Maryland of 1785, chap. 27, sec. 6, is in force in this District and regulates the control of insane persons.

STATEMENT OF THE CASE.

Wm. M. Bryant sued out a writ of habeas corpus. In his petition he alleged that he was a resident of the District, and was confined in the Government Hospital for the Insane, being there unjustly and unlawfully restrained of his liberty by Dr. Wm. W. Godding, the superintendent of said hospital. Wherefore he prayed the writ of habeas corpus "that the justice of his confinement may be inquired into."

The writ having issued, Dr. Godding, the respondent therein, made return that the petitioner was detained in virtue of a certificate of two physicians and the request of his sister, Mary Bryant, for his admission in accordance with sections 4854 of the Revised Statutes of the United States. That at the time of his admission, in October, 1877, he was suffering from insanity with homicidal proclivities, which had varied in intensity since that period. During his confinement he had had lucid intervals which sometimes continued for a considerable period, during which he was employed at wages in the hospital. That his insanity was liable to recur at any time, being only in abeyance, and depended largely upon the regularity of his life under hospital care.

A traverse of the return was filed by the petitioner in

which the detention by virtue of the physician's certificate was admitted, but the legality of the commitment was denied. The traverse further stated that the petitioner was sane.

The physician's certificate and request for admission made by the petitioner's sister, both dated October 18, 1877, were as follows:

We, the undersigned, practicing physicians of the District of Columbia, do certify that we have personally examined into the health and mental condition of Wm. M. Bryant, and that we believe him to be insane at this date, and a fit subject for treatment in the Government Hospital for the Insane.

GRAFTON TYLER, M. D.

WM. G. PALMER, M. D.

To the Superintendent of the Government Hospital for the Insane:

The undersigned, who is at this time a resident of Alexandria, Virginia, is desirous of placing in the Government Hospital for the Insane, and hereby request the admission therein, of her brother, William M. Bryant, who has been insane, with lucid intervals, since 1861, and is a native of Lancaster county, Va., and is a brother of the undersigned and in consideration of his admission to the institution and remaining in it, she hereby agrees to comply with the regulations of the hospital in respect to the payment of board and in all other respects.

MARY BRYANT.

The following is section 4854 of the Revised Statutes, by virtue of which it was claimed the prisoner was admitted and detained in the asylum:

"Sec. 4854. The independent or pay patients may be received into the Hospital for the Insane on the certificate of two respectable physicians of the District, stating that they have personally examined the patient, and believe him to be insane at the time of giving the certificate and a fit sub-

ject for treatment in the institution accompanied by a written request for the admission from the nearest relatives, legal guardians or friend of the patient, where he may remain until restored to reason. The friends of the patient shall comply with the regulations of the hospital in respect to payment of board and in all other respects. The request for admission must be made within five days of the date of the certificate of insanity."

HARRIS & OLIVER for petitioner:

On the hearing at chambers before the Chief Justice, the commitment and detention were declared illegal, and the petitioner was discharged from the custody of the respondent. An appeal was thereupon taken by the Attorney-General.

1. The certificates and request are insufficient to deprive a person of his liberty. The Constitution of the United States provides, that "no person shall be * * * deprived of his life, liberty or property without due process of law." Const. Amendment, Article V. The certificates are not even under oath of the physicians, and never were intended as a "due process of law."

2. The statutes of Maryland in force on February, 1801, remain in force now in this District, unless repealed or modified by Congress or the legislature of the District. Section 2 R. S. D. C. The act of Maryland of 1785, ch. 27, sec. 6, provides for the ascertainment of the mental condition of any person alleged to be insane. It requires a petition to the chancellor, a writ *de lunatico inquirendo*, and the verdict of a jury. Thereupon a committee or trustee is appointed to take the custody of the person or property of the idiot or lunatic, and the chancellor may intrust the person to one committee and the property to another. Alexander's Chancery Practice, 225, 226. We insist that the acts of Congress did not repeal the statute of Maryland, but merely established the hospital, prescribed rules for its government, and for the admission of insane persons into it. It fixed no rules for adjudging a person to be insane, which judgment

and determination must precede the examination (of the physicians) for the admission of persons already ascertained to be insane. The certificates are merely to show that the person is insane at the time the certificates are given; and are intended to follow some previous judgment or determination of the mental condition of the person admitted.

3. Due process of law, as defined by the courts and by the law writers, does not mean, the certificate of two physicians and the request of a sister. It means laws which hear before they condemn, and render judgment only after trial. It can not be a police regulation, independent of the judiciary and entirely under the control of the legislature. This would enable the legislature to deprive the citizen of his liberty, without the intervention of the judiciary or any other department of the government. 4 Wheat., 519.

Kent, defining it, says: "The larger and better definition of "due process of law," is that it means law in its regular course of administration through courts of justice."

For an exhaustive and full discussion of this point see Cooley's Constitutional Limitations, 351.

4. The court of Maryland (Chancellor Bland) says: "Generally and technically speaking, those only are considered lunatics, who have been so found and returned; without an inquest and return thereon, no one can be judicially treated as a lunatic, and be debarred of his liberty, or have the management of his property taken from him. The power to divest a citizen of his personal freedom, and of his property, is one of most extraordinary and delicate nature; and should, therefore, never be exercised without observing every precaution required by the law." Rebecca Owings' Case, 1 Bland Ch. Rep., 290.

WILLIAM A. MAURY for respondent:

Whatever may have been the meaning of the expression "due process of law," in the act of March 3, 1885, (Sec. 4844, R. S.) *Subsequent legislation*, now embodied in secs. 4845, 4847, leaves no room for doubt as to what Congress intended to be due process of law as to indigent insane.

Nor does § 4854 leave any doubt as to what Congress intended to be the procedure by which independent or pay patients were to be thenceforth admitted.

The power of chancery to issue commissions of lunacy is like the power as to infants. It is never exercised save when the lunatic or infant has property. Such a thing as assuming control of the person of a lunatic without property is unknown, for, in such a case, who would maintain the lunatic or pay his committee.

Mr. Justice JAMES, after briefly stating the case, delivered the opinion of the court.

We do not think that there is anything in the language of the statute which gives any power of compulsory seclusion without due process of law. It opens the doors of this asylum, and nothing more. It simply permits its use for an insane person—a pay patient—and means no more than the statute had prescribed the rate of boarding for such persons.

One of the terms for admission is that two physicians all certify to the insanity of the party. But that does not do away with the necessity of a proper judicial ascertainment of the fact of insanity. The provision for the physician's certificate only contemplates the fact that a person may have been found insane by a jury on inquiry, and that he may have become sane again, and, therefore, the certificate is to show that the insanity has not ceased. As a matter of interpretation, the statute is merely permissive. It gives no power to seclude a person *in invita* who has not been judicially found to be insane.

In our opinion this whole matter is regulated by the Maryland statute of 1785; chap. 27, sec. 6, which contemplates that the person, whose affairs the chancellor is to have control of, shall be found to be insane by a jury of inquiry. There must be a regular adjudication of the question by due process of law, without which even the chancellor cannot act; and due process of law in establishing the insanity of a person has long been declared to be

by inquiry through a jury. It would be impossible, therefore, that we should recognize the unsworn statements of two physicians to be due process of law.

This commitment has no resemblance to the cases of persons in the army or navy or marine corps, or, perhaps, even in the revenue service. There the parties are already under control. A soldier can be made to go into the hospital for medical treatment, upon the judgment of his superior officers, and they can order him to this asylum if they think that he ought to go there, and in that case the officer's action would be due process of law.

But in the case of a civilian, the order of an executive officer, upon the mere unsworn certificate of physicians, cannot be called due process of law.

This deprivation of the liberty of a citizen upon the ground of lunacy is a matter of very grave importance, because it may easily happen that for fraudulent purposes, perhaps with a view to deprive a person owning property of his control over it, a perfectly sane man might be sent to an asylum by his relations, upon a certificate of two physicians, and be illegally confined there for years.

We hold, therefore, first, that these sections of the Revised Statutes do not contemplate compulsory seclusion in this institution without due process of law. They only open its doors to those who have been properly found to be insane persons. If they meant anything else they would be unconstitutional.

And, secondly, we hold that the whole matter of the care of insane persons is regulated by the act of Maryland of 1785, which includes this proceeding of an inquiry by jury.

The judgment below is therefore affirmed.

THE BALTIMORE & OHIO RAILROAD COMPANY

vs.

MARGARET HETZEL ET AL.

{ Decided March 10, 1885.

{ The CHIEF JUSTICE and Justices WYLIE and JAMES sitting.

1. H. recovered \$843.36 damages of a railroad company for obstructing the highway, and the General Term, affirming the court below, entered judgment for that amount, March 4, 1876. H., not satisfied with the amount of the judgment, appealed to the Supreme Court of the United States, where the judgment was affirmed. H. filed the mandate in the General Term, June 26th, and the court that day entered judgment for \$843.36, with interest from March 4, 1876. September 3d, following, the defendant company filed a bill in equity alleging improper representations in procuring the judgment on the mandate, also that the mandate contained no order to allow interest, and praying that H. be required to accept the principal sum only in satisfaction of the judgment. The defendant on oath denied improper representations. Upon hearing on bill and answer the court below dismissed the bill.

Held, That as there was no proof that the entry of the judgment was irregular the bill was properly dismissed.

2. Baptist Church v. Railroad Company, 2 Mackey, 458, commented upon as to whether judgments in tort carry interest in this District.

STATEMENT OF THE CASE.

Appeal from a decree in Special Term dismissing a bill in equity and dissolving an interlocutory injunction. The court at the same time heard argument upon a motion filed in General Term September 8, 1884, to vacate for alleged irregularity a judgment entered at a previous term, the motion involving a consideration of the same subject matter. The facts are briefly as follows:

In 1873, the defendant, Mrs. Margaret Hetzel, entered suit at law against the complainant for alleged injury to her property at the corner of D and North Capitol streets by reason of the unauthorized occupation of the two streets by the complainant. The case was sent to a referee, who awarded damages to the amount of \$843.86. Exceptions were taken by both sides. The exceptions were certified to the General Term, and were all overruled and judgment entered for the plaintiff for the amount of the referee's award. This was on March 4, 1876.

On March 27, 1876, the plaintiff, Mrs. Hetzel, sued out a writ of error, and took the case to the Supreme Court of the United States. In May, 1880, the judgment was there affirmed. The mandate was not taken out by the plaintiff for more than four years afterwards, and was filed in this court June 26, 1884.

On March 20, 1876, an attachment was laid in the hands of the company by a judgment creditor of Mrs. Hetzel. On the 22d of March, 1876, another attachment was laid, and December 16, 1879, a third attachment, by a third creditor. The amounts sought to be secured by these attachments largely exceeded the amount of the judgment against the company. The company answered the interrogatories in the attachments, setting forth the facts of the judgment against it, and stating that that was its only indebtedness to Mrs. Hetzel. These attachments remained in force until June, 1884, when they were settled at the time the mandate was filed.

In January, 1881, the company instituted a suit in equity in the nature of a bill of interpleader, alleging that they could not safely pay the judgment because of the attachments in which suits they had been garnished, and asking leave to pay the money into the court. A demurrer to the bill was sustained on the ground that the complainants therein denied their liability to pay interest and for other defects. No further proceedings in this direction were had.

The company were notified by letter, June 26th, that the mandate had been filed and the attachments dissolved; and they were requested to pay Mrs. Hetzel's counsel the amount of the judgment with interest from March 4, 1876. They replied, July 5th, that the letter was duly received and that the matter would be reported to the company at Baltimore, and no doubt receive prompt attention.

June 26th, the day the mandate was filed, the court in General Term entered judgment in the following words:

"The plaintiff having prosecuted a writ of error to the Supreme Court of the United States from the judgment of this court of March 4, 1876, which was in her favor

\$843.36 damages, and \$101 for costs of suit, and the said Supreme Court of the United States having affirmed said judgment with costs, and adjudged that the defendant recover the same against her and have execution therefor, and remanded the cause to this court, and command this court that such execution and proceedings be had in the cause as according to right and justice, and the laws of the United States ought to be had, said writ of error notwithstanding, it is thereupon, by this court, considered, that the plaintiff have execution of her aforesaid damages against the defendant, with interest thereon from March 4, 1876, aforesaid, less the cost of the writ of error aforesaid."

The mandate said nothing about interest.

Upon the 3d of September, 1884, the company filed a bill, alleging the facts as to the attachments, and that they were garnished in those suits; that the mandate was filed without notice to them, and obtained by improper representations of counsel; that the entry of interest upon the judgment was a violation of the terms of the mandate, and that the judgment was entered so near the end of the term that the complainants were deprived of an opportunity to have it corrected. The bill prayed that defendants be restrained from paying execution, and that the complainants be allowed to pay the principal sum and costs into court, and the defendants be required upon such payment to enter the judgment satisfied.

The defendants, upon oath, denied improper representations, and otherwise answered the bill. On the coming in of the answers, September 11, 1884, the court ordered the principal and costs to be paid to Mrs. Hetzel, or her attorney, and the interest to be paid into court, and continued the restraining order until final hearing. No testimony was taken; and at the hearing, February 19, 1885, upon bill and answer, the court dissolved the injunction and dismissed the bill, with costs to defendants. From this decree the company appealed.

The company likewise filed a motion in General Term, September 8, 1884, to vacate the judgment for substantially

the same reasons as set forth in the bill in equity. The plaintiff, Mrs. Hetzel, having levied upon the property of the company immediately after the dissolution of the injunction, the court in General Term, upon motion of the company, advanced the cause for hearing.

M. F. MORRIS for plaintiff:

1. A judgment upon tort does not bear interest at common law, and there is no statute law in this District giving interest upon such a judgment.

By section 829 of the Revised Statutes for the District of Columbia, judgments in actions upon contract bear interest, and the amount which is to bear interest and the time for which interest is to run, are remitted to the verdict of the jury. By its implication, this necessarily excludes from the incident of interest all judgments based upon actions for torts.

By section 713 of the same statutes, it is provided that "the rate of interest upon judgments and decrees * * * shall continue to be six dollars upon one hundred dollars for one year * * *." But this plainly does not propose to make any new law; it provides only for the continuance of such interest as was then in force. And this is the more apparent, inasmuch as the object of the statute was to allow interest, by special agreement of parties, at any higher rate up to ten per cent.

2. The rules of the Supreme Court do not apply in this case; and it is plain that the statutes of Henry VIII, referred to by Mr. Justice Hagner in the opinion in the case of the Fifth Baptist Church vs. The Baltimore & Potomac Railroad Company, 2 Mackey, 458, do not apply. In that case the defendant appealed, and this court allowed interest during the pendency of the appeal, upon the sole ground that the mandate of the Supreme Court provided in express terms for interest.

3. The plaintiff in this case, by her appeal, prevented the defendant from paying the judgment, and thereby necessarily waived interest upon it.

4. The defendant ought not to be charged with interest while the money in its hands was under attachment.

Boyd vs. Mattingly (20 Howard, 132) shows the only exception to the rule, that where the garnishee is charged with having used the money, and to have realized interest or benefit from it, the party seeking to charge him must show the use. The court certainly cannot infer such use.

5. The judgment ought not to bear interest, because the mandate of the Supreme Court does not authorize interest.

6. The complainant had not the opportunity of being heard before the entry of the judgment upon the mandate, and it moved as soon as it reasonably could. It ought not, therefore, to be precluded now from having this question of interest investigated.

FRANK W. HACKETT for defendant:

We filed the mandate June 26, 1884, and on the same day sent a letter to counsel for railroad, acquainting them with the fact. They admit that they duly received it. The court adjourned finally July 5th.

Having neglected to move in the General Term during the term at which the judgment was rendered, and there being no fraud or accident shown, equity will not relieve. *Ins. Co. vs. Hodgson*, 7 Cr., 322; *Embry vs. Palmer*, 107 U. S., 11.

Nor will the court upon motion disturb the judgment entered last term. Nothing in the mandate forbade this court to enter judgment as they did. The allowance of interest was considered by the court. It was in no sense an "irregularity." The court did just what it intended to do; and to say that it did not look at the record is to impute neglect to the court. The question is not open whether on a review of the case this court would enter precisely the same judgment. The only question is, was that judgment what the court at the time intended it should be? This precludes a discussion of what the law is upon such a state of facts as the record then disclosed. Whether right or wrong, the court decided it.

An appellate court cannot reverse or annul, or materially change its final judgment after the term in which it was rendered. *Ex parte Sibbald vs. U. S.*, 12 Peters, 488; *Bridge Co. vs. Stewart*, 3 How., 424.

Mr. Chief Justice CARTTER delivered the opinion of the court.

We think that this application comes too late. The mandate of the Supreme Court of the United States came down June 26th, 1884, commanding us that such proceedings be had in the cause, as, according to right and justice and the laws of the United States, ought to be had. We, thereupon, entered judgment on that day, with interest from March 4th, 1876, and on the 5th of July following we adjourned *sine die*.

We added interest, it seems, to the judgment. That ordinarily we have power to give interest is manifest, indeed, it is not seriously denied; but whether this particular judgment was, under the circumstances, entitled to have interest added is a matter of debate. We determined that it was.

Can that determination be shaken by a bill in chancery? Clearly not, if the judgment was regularly entered, and the error alleged is an error of law. The remedy for that has expired with the term. Was this a clerical error? No evidence has been brought forward to convince us that it was irregularly entered. We have only the counsel's logic that, from the nature of things, we could not have deliberated upon the question of interest. But it will not do to say that counsel says that the court did not deliberate—did not consider the question of interest; but the record says we did.

It has been argued that the defendant company ought not to pay interest on this judgment because it had been garnished in several suits, and that at the time of rendering our judgment in obedience to the mandate, we could not have known of the fact of these garnishments, as there was nothing in the record before us to show it. *Bond vs. Mattingly*, 20 How., 132, has been cited to show that a garnishee is not chargeable with interest. But even if all this be true the company in this case had a full opportunity to have

brought the fact of the garnishments to our attention during the term in which this judgment was rendered. It is shown that Mrs. Hetzel's counsel, on the day of filing the mandate, wrote a letter to the company's counsel informing them of the fact; and they admit that they received it. They had several days during the term to file their motion to vacate the judgment, and, therefore, there is no ground to allege surprise.

Much stress has been laid upon the appeal which was taken to the Supreme Court. Mrs. Hetzel got judgment for \$843. She was not satisfied and appealed. It is claimed that she thereby caused the delay in the Supreme Court, and the company ought not to pay interest during that time. But this is not a correct view of the character of the office of that appeal. It was not that she complained of a denial of justice in recovering \$843; but she complained that she had not got enough. She went to that court to get more. Her appeal was not a remittitur to the railroad company of the amount she had recovered here, but a reaching after higher compensation through the agency of that court.

We do not have to decide in this hearing whether a judgment in tort carries interest in this District. Ordinarily a judgment in tort does not carry interest; still there are indications in our statutes that it does. We had that subject under consideration in *Baptist Church vs. Baltimore & Potomac Railroad Company* (2 Mackey, 458), and though it was not necessary to decide it, and we made no decision, yet we were all of opinion that such ought to be the law. It certainly is justice in the present case that interest should follow. That question came up when we entered a judgment on the mandate. There was nothing irregular about the entry of judgment, and it is now too late to reverse or alter it. Our arm is not long enough to reach it.

The bill is therefore dismissed, and the motion to vacate overruled.



TALLMADGE E. BROWN *vs.* DISTRICT OF COLUMBIA.

EQUITY. No. 7329.

{ Decided June 2, 1884.

{ THE CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

1. The purchase of a product does not constitute the purchaser an infringer of the patent for the machine or process by which it is produced.
2. The advantages claimed under patent No. 94,062, issued August 24, 1869, for the paving block therein described are purely fanciful, and the block has no patentable novelty.
3. Patent No. 101,590, also for paving block, is likewise void under either of the two constructions which the claim is susceptible of. Construed as a claim for a new arrangement of paving blocks of a known shape without reference to their material, it was anticipated by the English patent granted Lindsay in June, 1825. Construed as a claim for the application of a known arrangement to a new material, it would not be a patentable novelty.

STATEMENT OF THE CASE.

This case having been heard below was appealed to the General Term where, upon a full hearing, Mr. Chief Justice CARTTER, after commenting on the facts, announced that the court had concluded to affirm the decree for the reasons stated in the opinion delivered by Mr. Justice Cox in the court below, which opinion was as follows:

Mr. Justice Cox:

The complainant claims for the infringement of three several patents held under various assignments.

The District of Columbia is charged with having caused to be laid down for public use, and without license from the owners of the patents, several patented pavements, and using patented wooden blocks, and using a patented method of producing them.

Patent No. 94,063, issued to Ballard, and afterwards partially assigned to complainant, was for a method of cutting blocks for a wooden pavement so as to form by two cuts, or one cut and one splitting, two finished blocks with top and bottom level or in parallel, and the sides beveled, one side being inclined with the fibre, and without waste of material.

There is no evidence in the cause that the authorities of

the District of Columbia, or their agents, had anything to do with the production of blocks to be used on the streets of the kind described, or of any other kind. These blocks were furnished under contracts, and if any one is guilty of infringing this patent, it was the contractor, and not the District. The purchase of a product does not constitute the purchaser an infringer of the patent for the machine or process by which it is produced.

Another patent alleged to be infringed is No. 94,062, issued to Ballard August 24, 1869.

This is for two things, viz.:

1. The block itself before described as an article of manufacture, i. e., a wedge-shaped block having the grain running parallel to one and oblique to the other of their beveled sides; and—

2. A wooden pavement constructed of these blocks.

That wedge-shaped blocks of wood for pavements were not new when this patent was applied for, it is substantially admitted in the application. And, indeed, they are described both in Cowing's previous application of 1865, with one beveled side, and in Miller & Mason's patent of 1868, with both sides beveled.

The advantages claimed for the block having the grain parallel with one beveled side, upon which the whole claim of novelty rests, are, in my judgment, purely fanciful, and this block has no patentable novelty. If so, neither is there any patentable novelty in a street laid with this kind of block, and having that only as its merit. I found my judgment, as to this, both on the testimony and ocular inspection.

I do not think, therefore, that any case is made out of an actionable infringement as to patents Nos. 94,062 and 94,063.

The more difficult question relates to patent No. 101,590, originally applied for by Turner Cowing in 1865, but afterwards issued to the complainant, his assignee, in 1870.

The defendant insists that this patent also is void for want of novelty, and in its answer gives notice of several prior patents, English and American, which are supposed to anticipate the alleged invention.

A memorandum of these, in the order of their dates, is as follows:

Chambers' Patent (English), 1824.—Nature of the Invention.

"Consists in an arrangement of conical-formed stones, &c., placed on their natural bases, cemented together at their lower extremities, and having their remaining interstices filled with loose materials insoluble in water."

He proposes, however, for all ordinary pavements, to make use of stones broken and hewn in the manner in which they are usually prepared for paving, but taking care, in their application to the said improved pavement or carriageway, always to lay their natural bases or largest end downwards, which is the exact reverse of the mode adopted by pavers.

Lindsay Patent (English), June, 1825.

Describes his street as—

"Paved with the common or usual-sized paving stones, but the method of arranging them is as follows: Instead of laying them with the broadest ends upwards, I lay them with their broadest ends downwards, and as each stone is made of a wedge form, this leaves a considerable space open between the stones; these I close with smaller stones of a wedge form, which, being carefully placed and well rammed down, after a sufficient quantity of fine gravel or grout has been worked between them, will make a pavement nearly as substantial as a solid sheet of granite."

Nicholson Patent, 1854; Reissue, 1867.

"Board or other foundation made water-proof; square blocks in transverse rows, with spacing strips between to make a groove, the groove to be filled with broken stone, gravel and tar, or other like materials."

Cowing's Patent No. 101,590.—Application in 1865, issued in 1869.

First application—

"The nature of my invention consists in providing and arranging blocks of a peculiar shape in manner to form

wedge-shaped crevices for the reception of earth or gravel, and wherein such earth and gravel will be retained to act as key to bind and confine the blocks in their place."

The amended claim in 1869 is for "a wood pavement composed of blocks, each side having a single plane surface, and one or more of the sides being inclined, and the blocks being so laid on their larger end as to form wedge-shaped grooves or spaces to receive concrete or other suitable filling."

It will thus be seen that Cowing does not claim the use of wood as new in the construction of pavements; nor does he ever claim the use of wedge-shaped blocks as new, for he expressly disclaims a pavement composed of wedge-shaped wooden blocks when they are laid alternately on the larger and smaller end. But what he claims is, substantially, the allocation or arrangement of the blocks, so as to leave wedge-shaped grooves or spaces between them to receive concrete or other suitable filling to act as a key to bind the blocks together.

This claim may be susceptible of two constructions:

1. It may be construed to be a claim for a new arrangement of paving blocks of a known shape, without reference to their material; or,
2. It may be a claim for the application of a known arrangement to a new material, *i. e.*, wood instead of stone.

If the first, it seems to me that it was anticipated by the patent of Lindsay of the year 1825.

He proposes to use wedge-shaped stone blocks, with the large end downwards, and fill in the wedge-shaped crevices with small wedges of stone, gravel and grout, thus accomplishing precisely the same end proposed by Cowing.

It seems to me that this is the proper construction of Cowing's claim. He lays no stress upon the use of wood. He says nothing about the filling being forced by ramming into the fibre of the wood, as does the witness for complainant. But finding the material actually in use or coming in use, but without special reference to that, he proceeds to invent, as he supposes, a novel mode of using it, so as to save a compact and durable street surface.

But if the second construction be the proper one, I should say that the substitution of a new material in a known device or arrangement or mode of construction of a street would not, according to the decisions of the Supreme Court, be a patentable novelty.

On these grounds, I feel constrained to hold that Cowing's patent cannot be sustained, and consequently the bill of complaint must be dismissed.

THOMAS SUNDERLAND AND C. J. HILLYER

vs.

HALLET KILBOURN, JAMES M. LATTA AND J. F. OLMSTEAD.

EQUITY. No. 7,764.

{ Decided July 5, 1884.

{ The CHIEF JUSTICE and Justices WYLLIE and JAMES sitting.

1. One cannot be agent for the purchaser and agent for the seller at the same time. The duties are incompatible and a contract for such employment is utterly void.
2. A contract may be illegal and void in part as against public policy and yet good as to the residue.
3. K. & L., a firm of real estate agents, were employed by S. and H. to make purchases of real estate. Under the contract, if the property was accepted at the price submitted, K. & L. were to be paid a commission on the purchase price. At the time of, and some time before, entering into the contract, K. & L. held the refusal of a piece of property at \$40,000. After the contract was entered into K. & L. took the money deposited with them by S. and H. and purchased it for themselves, and then, without making known to S. and H. that they were really the owners of the property, submitted it to them at \$65,000. The latter accepted it at that price, and the conveyance was accordingly made. S. and H. subsequently discovered the real facts, and claimed the benefit of the purchase \$40,000. But it was held that K. & L. were under no obligations to give S. and H. the benefit of a contract of refusal entered into before their contract with them. That the remedy of the latter was to repudiate their contract if imposition had been practiced by a concealment of facts; but they could not retain the property and recover the \$25,000 in addition.
4. And where in another transaction under the contract a return of part of the purchase money was claimed on the ground that K. & L. had defrauded the vendors of it, it was held that even if the vendors had been defrauded

as alleged, this fact did not entitle S. and H. to receive the benefit of it.

5. But where K. & L., acting under the contract, purchased a piece of property at 40 cents a foot and turned it over to S. and H. at 50 cents, at which price the latter agreed to take it, it was *held* that K. & L. were accountable to them for the difference.

6. Facts considered which entitle agents to compensation for the care and management of property in their charge, and the measure thereof fixed by the court in view of the circumstances of the case.

7. Cases of fraud, trust and account, are within the jurisdiction of courts of equity. Section 723 of the Revised Statutes, which declares that the courts of the United States shall not exercise jurisdiction where a remedy exists at law, only emphasizes a doctrine which existed before the passage of the statute.

BILL IN EQUITY for an account.

THE CASE is stated in the opinion.

J. H. RALSTON and JOHN SELDEN for complainants.

ENOCH TOTTEN and SHELLABARGER & WILSON for defendants:

First. In this case there is a plain, adequate and complete remedy at law. "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law." R. S., sec. 723.

There is not one of the items of the claim in this bill which involves a question of trust, an unadjusted account, nor the necessity of a discovery. The entire controversy could be much more readily settled in an action at law than an equity proceeding. *Heine vs. The Levee Com'rs*, 1 Wood, 246; *Fowle vs. Lawrason*, 5 Pet., 503; *Sadler vs. Robinson*, 2 Stew., 520; *Ins. Co. vs. Stanchfield*, 1 Dill, 425; *Russ vs. Wilson*, 22 Me., 207; *Crooker vs. Rogers*, 58 Me., 339; *Law vs. Thorndyke*, 20 Pick., 317; *Youngblood vs. Youngblood*, 54 Ala., 486; *Russell vs. Little*, 28 Ala., 160; *Woodman vs. Freeman*, 25 Me., 531; *Bridge Co. vs. Van Etten*, 36 Mich., 210; *Murphy vs. Barron*, 1 H. & G., 258; *Casey vs. Centiss*, 3 How., 255; *Ins. Co. vs. Hill*, 60 Me., 183; *Suter vs. Matthews*, 115 Mass., 253; *Grand Chute vs. Weninger*, 16 Wall., 374; *Moore vs. Middlebaum*, 8 Mich., 433; *Adair vs. Wariherta*, 7 G. & J., 114; *Ashley vs. Denton*, 1

Lit., 86; *Scott vs. R. R. Co.*, 34 N. J. Eq., 354; *Wright vs. Butler*, 6 Wend., 284; *Cope vs. Wheeler*, 41 N. J., 303.

Second. The complainants say that they made a bargain by which the defendants agreed to act as their agents and brokers, to purchase for the complainants real estate, and with the fraudulent provision that if they could not succeed in deluding their customers and other sellers into the belief that they, the defendants, were their agents, then in that event, these complainants would pay the defendants for their services rendered in that behalf. But if these sellers could be cheated into paying commissions then the complainants were to pay nothing. Such a contract is not only a gross violation of every rule of morality, but also of the plain rules of law, as they have been declared in judicial decisions from time immemorial.

The defendants, in their several answers and in their testimony, positively and absolutely deny that any such agreement was ever made or thought of by any one of them. But even if such contract was made it is void, because it is inconsistent with public policy. A double agency of a real estate agent or broker involves inconsistent duties, and it is clear, upon both principle and authority, that in case of such double employment, the contract is void. It has been doubted whether such double agency, made even with the consent of both buyer and seller, can be upheld on the ground of public policy. See *Myer vs. Hanchett*, 43 Wis., 246; *Raisin vs. Clark*, 41 Md., 158. That such double agencies are void when the employment is concealed from one of the principals, there can be no doubt. Story on Agency, secs. 9, 11, 195, 210, 241; *Ringo vs. Binns*, 10 Pet., 269. Am. Law Reg., 61 (January, 1876); *Rupp vs. Sampson*, 16 Gray, 398; *Stewart vs. Mather*, 32 Wis., 355; *Meyer vs. Hanchett*, 39 Wis., 419; *Farensworth vs. Hemmer*, 1 Allen, 494; *Walker vs. Osgood*, 98 Mass., 348; *Ballman vs. Loomis*, 41 Conn., 581; *Ernhart vs. Searle*, 71 Pa. St., 256; *Lloyd vs. Colston*, 5 Bush., 587; *Shirlaw vs. Monitor Iron Works*, 41 Wis., 162; 1 Lead. Cases in Equity, 250, and authorities there cited; *Marye vs. Strouse*, 6 Sawyer, 204; *Michaud vs.*

rod, 4 How., 503; *Connelly vs. Bond*, 34 Barb., 276; 4th ed. Com., 7 ed., 475; *Bell vs. McConnell*, 37 Ohio St., 395. Third. The complainants are too late in making their complaints, and this is true of both branches of the case.

The last purchase of real estate was made June 19, 1872. The bill was filed June 9, 1881, nearly nine years after the complaint was made. To avoid the defence of a stale claim, the complainants say they did not discover the alleged fraud until recently, when they examined the deeds. These deeds were recorded October, 1872. They are bound by the knowledge which the records of these deeds disclosed. See *Ant vs. Coal Co.*, 93 U. S., 326; *Board of Comm'rs vs. R. Co.*, 18 Fed. R., 209; *S. C.*, 4th McCreary; *Sullivan vs. Sunderland*, 94 U. S., 806.

The firm was dissolved December 31, 1876, and mutual settlement had been made amongst the members, money paid over, property transferred, and, in fact, in many respects, the positions of all the defendants has been changed to such a degree as to render the defence of laches a most fit and equitable one.

Fourth. Between merchants at home, an account which has been presented, and no objection made thereto after the lapse of several posts, is treated, under ordinary circumstances, as being by acquiescence a stated account. 1 Story's eq., 520-526; *Wiggins vs. Burkham*, 10 Wall., 129; *Chapdelaine vs. Decheneaux*, 4 Cr., 306; *Freeland vs. Heron*, Cr., 147; *Lockwood vs. Thorne*, 11 N. Y., 170; *Baker vs. Biddle*, 1 Bald., 418; *Hopkirk vs. Page*, 2 Marsh., 29; *White vs. Macon*, 3 Cr. C. C., 250. And the account need not be signed by the parties; it is enough that it shows a balance, and that there is none. *Baker vs. Biddle*, 1 Bald., 418; *Bainbridge vs. Wilcocks*, 1 Bald., 539.

The rule that delay in objecting to an account stated will be deemed an acquiescence, applies to corporations. *Brady vs. Richardson*, 2 Blatch., 354.

"Where a broker's pass book is made up of debits and credits, and a customer has had a fair opportunity to see how his account stands, the balances struck will be regarded as

accounts stated ; and after an apparent acquiescence, the customer will not be heard to plead ignorance of the facts." *Marye vs. Strouse*, 6 Saw., 209.

If a merchant neglects, after a reasonable time, to object to an account rendered by his factor, showing sales at a price below that at which the factor was authorized to sell, he is deemed to acquiesce in it ; and it is treated as a stated account. *Richmond Manfg. Co. vs. Starks*, 4 Mason, 297.

Fifth. After this "account stated" had been prepared, and, on the 26th of November, 1877, forwarded to the complainants, and by them retained, without objection, for nearly a year, they, on the 10th day of September, 1878, received the balance shown to be due them by that "account stated," to wit, \$2,715.58, in full discharge and release of the defendants, Kilbourn and Olmstead. This concludes them. See *Vedder vs. Vedder*, 1 Denis, 260 ; *U. S. vs. Childs*, 12 Wall., 242.

Sixth. Stewart was a partner during all the time the purchases complained of were progressing, and he is interested in proportion to his share in the speculation. His sale of the property did not carry with it the claim based on the misconduct of the defendant, if any there was ; such a claim cannot be assigned.

The objection of want of parties is taken in the pleadings. The absence of a necessary party is fatal, and the bill must be dismissed. See *Alexander vs. Homer*, 1 McCreary, 634 ; *Milroy vs. Storkwell*, 1 Carter, 35 ; *Robertson vs. Carson*, 19 Wall., 95.

Mr. Justice WYLLIE delivered the opinion of the court.

This is a controversy which grew out of the employment of the firm of Kilbourn & Latta by Messrs. Sunderland and Hillyer and William M. Stewart, in the year 1872, for the purpose of buying property in the northwestern section of the city on speculation. The operations of Kilbourn & Latta under this agreement were pretty extensive. The principals, Sunderland, Hillyer and Stewart, were here in Washington in the months of May and June, perhaps later,

in 1872. Within a period of five or six weeks these gentlemen, through their agents, Kilbourn & Latta, purchased property in that section of the city amounting to about \$600,000. Mr. Sunderland's interest in these purchases was one-half. Mr. Hillyer was to have one-quarter and Mr. Stewart was to have one-quarter interest. Soon afterwards, and in the same year, Mr. Stewart sold out his interests to Mr. Sunderland, so that a much larger interest in all these purchases was then vested in Sunderland. Besides that, Sunderland made some purchases for himself, in the same way, amounting to about \$150,000.

The bill in this case charges, first, that the agents were guilty of fraud in purchasing or securing bargains at one price and reporting to their principals at another price, and asking the difference. Secondly, they claim that the defendants, their agents, charged their principals with a large amount of commissions for the care and management of the property purchased, which commissions they aver were not earned.

Although the period covered by these transactions was a brief one, yet large purchases were made, the number was, I think, about 31 or 32 in all. The only subject about which there has been any controversy between the parties is in regard to four of these purchases, two squares and some lots. As to all the others there has been no controversy at all, except as to the charge for commissions and management.

Now, as to these four purchases the bill charges that these agents purchased square 115 for \$40,000, and charged the principals \$65,000, making a profit of \$25,000. They also charge that on square 155 there was a profit made in the same way of \$5,319.55. On lot 17, in square 158, they charge that a profit was made in the same way of \$3,316; and on three other lots or parts of lots in the same square a similar profit was made of \$2,663.70; and on square 156 a profit of \$14,601. These sums amount in all to about \$50,000.

It is important to inquire what kind of a contract this was. The bill sets out that there was a special agreement,

and specifies the terms of the agreement. The defendants in their answer deny that there was any special agreement, and assert only general employment. But this feature of the case can be illustrated best by reading the evidence of Mr. Stewart in regard to the nature of the employment and the character of the agreement, and the bill seems to intimate that the agreement was as has been proved by Mr. Stewart. Mr. Stewart was one of the original parties, and he says: "On consultation among ourselves, Messrs. Sunderland and Hillyer and I, we came to the conclusion that Kilbourn & Latta should be employed to negotiate the purchase we contemplated, and accordingly we consulted with and employed them in the business. It was distinctly understood that they should negotiate for such piece of property as we desired to purchase from time to time and buy the same at the lowest possible price, and that they were to have a commission on all purchases made by them but that in case the vendor should apply to them to sell that they should obtain a reduction from the purchase price of the commission which the vendor in such case would be liable to pay, and in that case it would be the same to us if we paid no commission."

And, on cross-examination, he says: "The exact terms of the agreement were, as near as I can recollect, that the firm of Kilbourn & Latta were to undertake to purchase such pieces of property as we might desire to purchase, and charge a commission therefor in each case. But in a case where the vendors sought them (that is Kilbourn & Latta), and in which case they were entitled to charge a commission as against the vendors, that the same should be deducted from the purchase price."

We think that such a contract as that was utterly void—wholly illegal. If Kilbourn & Latta under that contract had performed their duty faithfully to their employers (in this instance Sunderland, Hillyer and Stewart), it involved their betrayal of the other side. Sunderland, Hillyer & Co. were to select the pieces of property, and then Kilbourn & Latta were to sell, or procure authority to sell, the same

property to them at the lowest possible price; whereas it was their duty, if they were employed to sell, to get the highest possible price.

So that the arrangement between these parties was to do an illegal thing. Of course no contract of that kind can be sustained in a court of equity. The principle on which the rule here laid down depends is, as stated by Chief Justice Wilmot, the public good. I read for convenience from Broom's Legal Maxims, page 738.

"The objection," says Lord Mansfield, "that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy which the defendant has the advantage of contrary to the real justice as between him and the plaintiff—by accident, if I may so say. The principle of public policy is this: *ex turpi causa non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appear to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground that the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and the defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equal in fault, *potior est conditio defendentis*."

The court will never support a contract by which one party agrees to betray his duty to his employers, and thus we regard this contract as proved by Mr. Stewart. The same thing is proved by Mr. Hillyer and Mr. Sunderland, but is not stated with quite so much distinctness. The contract is set out rather more definitely in the bill, as of the same character; that is, where commissions could be

obtained from the other side, the selling side, there the purchasing side was not to pay.

We regard, then, this contract as set out in the bill, and more distinctly proved by the evidence, as immoral, contrary to public policy, calculated to create a breach of faith between these defendants and the sellers of the property, calculated to make it their interest to seek authority in the owners of the property to sell their property at the lowest possible price, when the law imposes the duty of obtaining for their employers the highest possible price.

A man cannot be both buyer and seller. He cannot be agent for the purchaser and agent for the seller at the same time. The duties are incompatible, and a contract for such employment is utterly void.

As we said before, there were thirty odd purchases made. How many of those purchases were made from sellers and for the lowest price, we do not know; it is not in proof here, and it is not our duty to investigate that subject. But as to these four particular pieces of property, we are of opinion that they do not fall within this unlawful contract.

Now, this contract, as we have described it, was a general contract in substance, but according to the contract, each purchase was to be a distinct purchase. These gentlemen were to designate to Kilbourn & Latta what property they wanted to buy, and then Kilbourn & Latta were to go and make the purchase. Each purchase, therefore, should occur by itself. Purchases were made at different times, the property was different, the parties were different. One purchase, therefore, might be good, whilst others might not be good; that is, under this contract.

There undoubtedly was a general employment of Kilbourn & Latta for their agency in this business under a contract which was objectionable in the feature we have pointed out. But if there were purchases made, and fairly made, which did not fall within the immoral terms of this contract, we think that such purchases may be sustained, and the claim for compensation might be allowed. For example, if Kilbourn & Latta were not employed to sell in any instance

by the owner of the property, or if they were the owners of a piece of property themselves, and sold to the other party with their eyes open, that would be a purchase and sale which does not fall within the objectionable terms of the contract. Wherever there is a transaction of that kind, a fair and honest transaction, the court will sustain it. Reading further upon that subject from Broom's Legal Maxims, page 741, it is said:

"It must be observed, however, that a contract, although illegal and void as to part, will not necessarily be void *in toto*. Thus, if there be a bond with condition to do several things, some of which are agreeable to law and some against the common law, the bond shall be good as to the former and void as to the latter only; and this rule is generally true with respect to a contract void and illegal in part as against public policy, and yet good as to the residue."

Now, although we have deemed it our duty to express our reprobation of this character of contracts, yet we think that some of the subjects of controversy in this case do not fall within the objectionable provision of this contract.

As to square 115, the first square on which a profit of \$25,000 was made, the facts, in brief, were these: Kilbourn & Latta had been in negotiation for the purchase of this square for about two years themselves, and had obtained (in the winter, I think it was in January or February, 1872,) the refusal from the owners at \$40,000. It was a square of ground which belonged to the trustees of a public institution. The trustees passed a resolution on their minutes recognizing the offer and accepting it at \$40,000. Kilbourn & Latta had not closed their contract when they entered into the arrangement with Sunderland, Hillyer and Stewart. But soon after, or it may be said simultaneously with making this arrangement with these gentlemen, they completed the purchase and they took the money which Sunderland and Hillyer had deposited with them, and completed the purchase at \$40,000, and then turned it over or submitted it to Sunderland, Hillyer and Stewart, to say whether they would take it at \$65,000 or not, without informing them what it

had cost them, or who were its owners. Sunderland, Hillyer and Stewart decided to take it at \$65,000. They judged for themselves. They had selected it beforehand, and they agreed to take it.

The claim of this bill is, that, under this agreement, Kilbourn & Latta ought to have turned that property over to these purchasers at \$40,000. We do not think so. They judged for themselves whether it was worth \$65,000. It was the property, substantially, of Kilbourn & Latta. They had had the refusal of it, and an interest in it to that extent, long before they had seen Sunderland and Hillyer, and in fact had been in negotiation for it for several years, and they were entitled themselves to the benefit of their bargain. They were not obliged by this contract to give these gentlemen the benefit of a bargain which they had previously made for this property. That would have been a very disadvantageous contract to them. They would lose \$25,000 by such a bargain as that, and all they would make would be commissions on selling \$40,000 worth of property. The law does not require any such extravagance of purity. It is very true that Kilbourn & Latta concealed the fact that they had this bargain, and that they were really the owners of the property. They ought in good faith to have told the whole truth.

But what would be the consequence of that? Why Sunderland and Hillyer, if they had any fault to find with the property, if they had been imposed upon by the concealment, might have repudiated the purchase. They would have said: "Why, here, we have been imposed upon. You concealed an important fact. You were our agents, and you ought to have told us *you* were selling this property." But they did not take that course. The property was a valuable purchase and they kept it.

By what principle of law do they claim, then, that they, who employed Kilbourn & Latta in the month of May, 1872, shall have the benefit of a contract which Kilbourn & Latta had secured for themselves months before? This contract does not give them any such right. The only objection to

in the world is the one which we have mentioned, and this is, that in making this sale to Sunderland and Hillyer, we did not inform them that they were selling for themselves. If they were imposed upon in that way, they could only have repudiated the purchase.

Tell, how is a court to make an allowance in a case of this kind and keep the contract, where they keep the property and make a profit out of the property, because they refuse to give it up? Why should they be allowed, then, to pocket a loss of \$25,000 upon their agents? We do not think that the principles of equity have reached quite so high a degree of purity as that, and we therefore conclude that the complainants are not entitled to this \$25,000. We think it is fairly the property of Kilbourn & Latta.

When there is a claim for profit on square 156 of \$14,601, and interest. That was a purchase made by the firm of Kilbourn & Latta from Mr. Kilbourn, trustee of the real estate association. There was a real estate association here in Washington for the purchase of property, which had been published several years. A number of gentlemen had invested their money, and the head managers of the syndicate were Messrs. Kilbourn & Latta, and Mr. Kilbourn, a member of that firm, was the trustee in whose name these purchases were vested for the use of the members of the syndicate. This firm had purchased this square some time before, and the title was vested in Kilbourn, as trustee for the syndicate.

When this square was sold by Mr. Kilbourn to these gentlemen, Sunderland and Hillyer, and Sunderland and Hillyer claim that they ought to have had that square at the same time that the syndicate had bought it for several years before. In the course of the evidence, they give as their reason (which we think does not belong to this case at all) the conduct of Mr. Kilbourn and of Mr. Latta toward these gentlemen who were in that syndicate, for the purpose of showing that Kilbourn & Latta had defrauded those who employed them. We think that that investigation does not belong to this case, but that the same principle which applied to square 115 applies also to this square 156;

that the legal title was in Kilbourn for the benefit of this syndicate, who had put money into the hands of Kilbourn & Latta for the purchase of this property, and that if Mr. Kilbourn, or Kilbourn & Latta, defrauded the syndicate, those frauds are not to be applied to the benefit of the plaintiffs in this suit. So that we think this \$14,601 does not belong to these plaintiffs. That makes about \$40,000 of this claim disposed of.

Another claim is profit on square 155 amounting to \$5,319.55. Without going much into detail with regard to that I will say that after that square had been selected by these gentlemen as a desirable piece of land to purchase, and Kilbourn and Latta were authorized to purchase it, they bought it for themselves—substantially for themselves, and this was the profit they made upon it in turning it over to these complainants. We think that that property ought to be accounted for. Good faith must be preserved by all agents, and these defendants had no right to buy or sell for anybody; they were merely employed as agents to negotiate. But when their employers pointed out the property which they desired to buy, good faith required that they should exert their best abilities for the purpose of purchasing it for them on the best terms they could. They had no right to go and buy it for themselves and make a profit from their employers out of it. This claim we think therefore is to be allowed.

Then there is the profit on lot 17 and on two or three other lots in square 158—lot 17, one-half of 9, 10 and one other lot; we think that those profits ought to be accounted for also. In regard to lot 17 there was this feature: The plaintiffs pointed out square 158 and said, "we are willing to give 50 cents a foot for any property you can get in that square." Kilbourn and Latta then set to work and they bought some lots in that square at forty cents and charged the complainants fifty cents. That they had no right to do. The profit of the purchase belonged to the employers. They were acting in the purchase for them, and whatever profit was made belonged to them. An agent is not to be encour-

aged in devices to make profits secretly out of the business in which he is engaged as against his employer. The profits of his employment belong to his employer. Good faith and public policy require a strict enforcement of this rule. These allowances should be made with interest.

We come, now, to a difficult feature of the case produced by a stipulation which has been filed in the cause. It is dated the 22d of March, 1882, and, in substance, it is an agreement by all the parties that the court is to render such decree for or against any or either of them as the evidence warrants. The firm of Kilbourn & Latta had been dissolved at the close of the year 1876, and Mr. Latta had gone to the west and the complainants in this case brought suit in equity against him out there in regard to these transactions. After the dissolution of the firm he had taken the care and management of this property and the others had not. He had received certain sums and the others had received certain other sums from the profits of this agency, and from the money with which they had been entrusted. He had rendered a certain class of services with regard to this property after that in which they had not participated, and in addition to the other questions in the case there is the question of the apportionment of his liability to these complainants arising out of the dissolution of the partnership.

To the suit which was brought there he filed his answer. All parties, the complainants and the defendants, were anxious to have but one litigation, and the result was that the western suit was brought here and a copy of the answer and the other proceedings in that case were filed with these, and this stipulation was entered into, that the court was to render such decree for or against any or either of the parties as the evidence warrants.

We hesitated a little about acting under such a stipulation. Evidence without allegation is of no consequence either in a court of equity or a court of law, and this bill was not framed with a view to this other litigation going on in the west; indeed the western litigation sprang up af-

ter this bill was filed, but the stipulation covers everything, and it is our purpose to try to carry out the objects of the parties.

This business began, as we have said, in June, 1872. The management of the business remained in the hands of Kilbourn & Latta up to and until the close of 1876. It was then transferred to Mr. Latta, who went out of the firm to a great extent, and these gentlemen are severally claiming compensation for their services in the management of the property. It will be remembered that these were purchases for speculation; not for private use. Kilbourn & Latta were the agents to carry on the speculation, and the title to the purchases was taken in the name of Mr. Latta, one of the members of the firm, in order to the more convenient management of the business. In these purchases one-quarter to one-third was paid in cash, and the notes of Mr. Latta were given for the deferred payments, or the encumbrances were assumed by him.

Soon after these purchases, which were made in 1872, came the business panic of 1873, which overspread the whole country; reducing the value of property everywhere. This property accordingly sank in value, and the correspondence in evidence shows that Mr. Sunderland, who was most largely interested in the property, and Mr. Hillyer, too, were almost ready to give up and lose their cash investments and let the property go, rather than meet the deferred payments. At any rate that was their intimation, and there is some evidence on that subject. Certain it is that the speculation at that time seemed to have turned in the wrong direction; it was a losing operation. But Kilbourn & Latta kept the property. They watched it; they paid the taxes upon it; they took care of these deferred payments (to be sure the complainants furnished the money), until towards the end, when it became necessary to raise a loan, I think, of \$35,000, and furnish security to pay that loan. We think for the persistence, pluck, determination and confidence shown by these agents during those disastrous years they ought to be well compensated. If this property had been in the hands of

its owners they undoubtedly, from the evidence we have, would have let it go and have lost their cash payments. But Kilbourn & Latta were always sanguine of the result ultimately, and they encouraged these men to hold on, and took care of the property, watched the assessments and took care of the deferred payments. Hillyer and Sunderland, the principal men, were absent in Europe a great part of the time. Stewart had sold out and had no longer any interest. We think they ought to be paid.

Now, the contract upon which this suit was brought contemplated that they should be paid out of the sales of the property that were made. That is the contract contemplated that Kilbourn & Latta should keep the management of the property until sales could be made. But in July, 1878, Hillyer and Sunderland came here. There never had been a settlement between these gentlemen. Here was \$600,000 or more of property and large sums of money deposited in the hands of agents, and large sums paid out, and there were a thousand items and no settlement. But in 1878 they demanded an account, and Kilbourn & Latta furnished them an account, and in that account they charged \$16,526.67 for the care and management of the property for about four years and after, as they claim. That was whilst it remained in the care of the old firm of Kilbourn & Latta before Mr. Latta went out. Besides that, Mr. Latta, after he went out, made a claim for care and management amounting to \$5,677.85, and besides that used a sum of money belonging to the complainants amounting to \$1,235.79. We think that though these services were valuable, this claim is too large, and to show that it is too large we refer to the account kept by Kilbourn & Latta with Sunderland. Under date of December 12, 1876, is the item, "care and management of whole property from May, 1872, to date"—that was during the whole period of it, and it is care and management, not only of Sunderland's interest, but of the whole property—" \$5,973.33." That was the value which they put upon their services in their settlement with Mr. Sunderland, and it is very strong evidence against

them. To be sure it is not an admission by which they are absolutely bound, and we do not propose to hold them to that. But we think, in the face of their own admission on that account, that an allowance of one-half of this \$16,526.67 would be ample compensation to the old firm of Kilbourn & Latta, and we make them that allowance of \$8,263.33½.

In regard to Mr. Latta's charge of \$5,677.85 for his management, if we divide that in the same way. We allow him one-half, and we charge him, also, with the \$1,235.79 which he undoubtedly used.

[His honor then went on to consider several other items of charge, but as the disposition of them involved only the consideration of questions of fact, that portion of the opinion is omitted. Concluding, he said:]

I am authorized to say for the Chief Justice that if he were present he would not concur in the conclusions we have reached. In his opinion this court has no jurisdiction. He thought that it was a case that belonged to a court of law. My brother James and myself think that it is a clear case for a court of equity; that it is a case of fraud, a case of trust, a case of account. There is an act of Congress (sec. 723, R. S.) which declares that courts of the United States sitting in equity shall not exercise jurisdiction where there is a remedy at law. The Supreme Court of the United States has put a construction upon that act, and it says that it adds nothing at all to the doctrine which existed before the passage of the act—that the statute merely emphasizes the principle. But, however emphatically that doctrine may have been declared in the act of Congress, we think that this is so clear a case for the jurisdiction of a court of chancery that we have not hesitated a moment in regard to the subject.

Mr. Justice JAMES said:

I will add one or two concurrent expressions in regard to some of the features of this case. First, it is alleged that the whole of these transactions were provided for in the preliminary general agreement; that the plaintiffs were to

employ the defendants on a large scale and were to have their services, no matter what the transactions should

That is to say, that if they were already employed other people to make sales, yet, if they desired to purchase that same land, the defendants should be under no kind of obligation to them as their agents. My brother Justice has, with emphasis, characterized the immoral effect of that kind of arrangement, and in that I entirely concur. In so far as it constituted an engagement that the defendants should be under obligations to them in their purchases from the defendant's employers, it is not permissible. But it has occurred to me to say that I have had, in the first place, no doubt of the establishment of that contract. It was agreed by the defendants, and there was a certain degree of improbability, perhaps a good deal of improbability, that men who were engaged in the business of real estate brokerage would commit themselves to so unprofitable an obligation. But besides that, I have the impression that that contract was not binding. I do not see any mutuality in it. It was said that these gentlemen were to be compensated primarily by their commissions in selling property on speculation. First, they were to have commissions directly from the plaintiffs where they were not already employed by other people, in which case their compensation would be from the latter. But as to this general agreement it ought to have been shown that there was a preliminary obligation assumed before a single purchase was made if that contract is to be enforced and applied. But here the plaintiffs were not bound after making a single transaction to go on, they were not bound to continue. It was not a contract in which on one side they bound themselves to make purchases to a certain extent, or to some indefinitely large extent, in consideration of which obligation the others were to serve them in this way. They were not bound to buy a dollar's worth for that matter; they could stop at any time. There were 31 or 32 transactions and they could have stopped at any of them—and this appears on the face of the contract. It is that there seems to have been no obligation assumed on

the part of these complainants to do anything. If that is so there were no mutual obligations. So that the alleged obligation, said to have been assumed before the purchases commenced on the part of Kilbourn & Latta, was not made binding by a consideration of obligation on the other side.

If there were no such preliminary agreement, namely, that in every transaction the defendants were to be the agents of the complainants, then what would be the character of the transaction in square 115? It would be simply this, and you will find in it nothing that will support the complainant's claim that the complainants undertook to buy this square 115. But that would not preclude the defendants from selling their own property. If, however, it involved an obligation, as I think it did, on the part of the defendants to disclose that they were acting as principals, it would still be necessary to ascertain what the injury was. The complainants would have to establish some damage that they had suffered. Without the help of this general preliminary contract, they could not insist, it seems to me, that on discovering that the defendants had bargained for that property, that bargain must be understood to have been made for them. If they had no preliminary agreement which was binding, it was reducible to this, that after these defendants had made the bargain for square 115, the complainant undertook to purchase through them. They were not informed, though, that those whom they undoubtedly regarded as their agents were themselves the principals. It is difficult to see where the damage lay in that case. They took it at their own price, the price which was reported to them. It is not demonstrated that they paid any more than they would have paid if they had known who was the owner. But after that occurred, if they had a right to complain, then it seems to me clear, as has already been stated in the opinion of the court, their remedy lay simply in throwing up the bargain. There is a principle in the law that a party cannot hold on to a contract, or insist upon its being carried out, as they did, by retaining the fruits of it, and have damages for the

breach of it; in other words, treat it as a contract fulfilled and as a contract broken.

With regard to these other cases, in which they were told that the plaintiffs would give 50 cents a foot for whatever lots could be obtained in square 158, I think it ought to be very distinctly understood that this court will not sustain any such construction as has been put upon that matter by the defendants. In the argument it was said to us that, substantially, the plaintiffs said to Kilbourn & Latta, "we will give you 50 cents for anything you can get." They did no such thing. There is not such a word in the evidence. They did not say, "we will give *you* 50 cents for anything you can get." There was a colloquy at the bar upon this subject, basing it all on that phrase. They simply said, "we will give 50 cents for whatever you get;" and they did not mean that they would give 50 cents absolutely, but that that was their limit, and one of the defendants said that they regarded this as an open order, in which case the broker takes care of himself. Well, he cannot do it in this court. We do not allow him to take care of himself. He knows perfectly well that he is employed by the purchaser when he is not already acting for the seller. The price, the limit named, is 50 cents, and when he makes the negotiation, he is obliged to regard himself as making that negotiation for his principal, the purchaser. In that case he had already one principal, namely, the purchaser, and he could not act for another. I do not care what the view taken by brokers is; it is time they should find out the view of courts of equity, and the view of the law, that when so employed they are to act simply for the principal, and it is not for them to take care of themselves. There is the most emphatic reason for holding them liable in that part of the matter.

THE BALTIMORE & POTOMAC RAILROAD COMPANY

vs.

JAMES B. EDMONDS ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

EQUITY. No. 9262.

{ Decided March 10, 1885.

{ The CHIEF JUSTICE and Justices MAC ARTHUR and JAMES SITTE sitting.

The charter of the Baltimore & Potomac Railroad Company (act of Congress of February 5, 1867) authorizes it to take and use for depot purposes with the turnouts necessary to reach it, any lots of ground in the city of Washington contiguous to the line of its road; that is to say, any lots between the front of which and the line of the road no other lots intervene, and for this purpose square 232 is contiguous to the line of the road although by the recess caused by the intersection of several streets, it does not touch Maryland avenue along which the road runs.

STATEMENT OF THE CASE.

This was a bill in equity praying an injunction to restrain the defendants, Commissioners of the District of Columbia, from interfering with its work of laying tracks from its main line of railroad, Maryland avenue in Washington city, to the square of ground owned by it and known as square No. 233.

The allegations of the bill were substantially as follow

That the company's charter, section 12 of the act of the legislature of Maryland which was re-enacted by act of Congress of February 5, 1867, is as follows:

"That the president and directors of the said company shall be, and they are hereby invested with all the rights and powers necessary to the construction, working, use and repair of a railroad from some suitable point in or near the city of Baltimore, and thence within one mile of the town of Upper Marlboro in Prince George's county, and as near to said town, within the limits of said distance as may be practicable, and by or near the town of Port Tobacco in Charles county to a point on the Potomac river, to be selected by the president and directors of said company hereby incorporated, not higher up than Liverpool Point, and not lower down than the mouth of St. Mary's river, with such

branches at any point of said railroad not exceeding twenty miles in length, as the said president and directors may determine. The said road, when completed, not to be more than sixty-six feet wide, except at or near its depots or stations where the width may be made greater, with as many tracks as the president and directors may deem necessary; and the said president and directors may cause to be made, or may contract with others, for making said road or any part of it; and they or their agents, or those with whom they may contract, or their agents, may enter upon and use and excavate any lands which may be wanted for the site of said road or the erection of warehouses or other works necessary for the said road or for its construction and repair, and that they may build bridges, fix scales and weights, lay rails, may take and use earth, gravel, stone, timber or other materials which may be needed for the construction and repair of the said road or any of its works, and may make and construct all works whatever which may be necessary and expedient in order to the proper completion and maintenance of the said road; and they may make or cause to be made lateral railways in any direction whatever from the said railroad, and for the construction, repair and maintenance thereof shall have all the rights and powers hereby given in order to the construction and repair of said principal railroad, and may also own and employ steamboats or other vessels to connect the said railroad or railroads with other points by water communication, provided nothing herein contained shall be construed to authorize the said company to take private property for their use without compensation agreed upon by the company and the owners thereof, or awarded by a jury as hereinafter provided, being first paid or tendered to the party entitled to receive such compensation."

That the said act of Congress of February 5, 1867, authorizes the complainant, in constructing and maintaining its road in this District, to exercise the same powers, rights and privileges as it may exercise under and by intent of the said charter or act of incorporation, in the extension and con-

struction of any railroad within the State of Maryland, and that it shall be entitled to the same rights, compensation, benefits and immunities in the use of the said road, and in regard thereto as are provided in said charter, except the right to construct any lateral road or roads within said District, it being expressly understood that complainant shall have power to construct only one lateral road within the said District to some point or terminus within the city and county of Washington, to be determined in the manner thereafter mentioned.

That by virtue of the said authority, the complainant constructed its line of railroad along K street, southeast, and over Virginia avenue and Maryland avenue to and over the "Long Bridge," with various turnouts and sidings as authorized by law, and it constructed depots and warehouses for freight, and other works, at various places in said city and it now maintains and uses said tracks, sidings, stations and depots, warehouses and works, as by law it has a right to do, for the purpose of conducting its business of transporting freight and passengers by cars and locomotive engines propelled by steam.

That in consequence of the vast increase in the business of the complainant, and the inadequacy of its warehouse and track accommodations for such business, it purchased the square of ground before mentioned for about the sum of \$23,000. This square contains nearly one and a half acres of ground, and is especially adapted to and appropriate for the uses and necessities of the company in the proper conduct of its business. It is located in a sparsely inhabited part of the city, and will not incommode private persons; the proposed tracks leading to it will not obstruct the use of the streets to any greater extent than the presence of railroad tracks, skilfully laid, will obstruct any street. The streets in this vicinity are not used for general travel, but principally for the passage of wagons and carts loaded with bricks and other heavy freights passing from Virginia over the "Long Bridge." The contemplated improvement will be a positive benefit to the surrounding property.

That the said square is in the immediate vicinity of the Long Bridge, and is bounded by Water street, D and 14th streets, southwest, and Maryland avenue; the distance from Maryland avenue to the nearest point of the square is about two hundred feet. Water street, at this locality, although appearing as a public street on the plans of the city, has never been opened or improved, nor has it ever been used as a highway or thoroughfare by the public. There are no dwellings or buildings of any kind on the west of said square, it being practically on the bank of the Potomac river, and only one building north of and in immediate or close proximity thereto, and that building is not used for the purpose of a dwelling house, but is, and for a long time has been, used as a depot for stores belonging to the Quartermaster's Department of the Army of the United States. On the east side of 14th street, and between D street and Maryland avenue, there are only about four very small dwelling houses, and the distance between them and the square is so great that they cannot be injured, nor can the occupants thereof be annoyed by any use to which the square may be devoted by the complainant. This tract is one of the most convenient and suitable pieces of ground for the accommodation of the complainant's business and the business interests of the city of Washington which can be found along the line of the railroad.

That the use of the said square, and the contemplated stations, warehouses, and other works to be erected and used thereon, are necessary, proper and expedient in the working of said railroad, and in the proper conduct of its business. Said square was selected and purchased at great expense for the purposes aforesaid, because its location and surrounding advantages made it especially suitable therefor.

That in consequence of the increase of the business of complainant in the city of Washington, and of the great increase in the wants and the supplies of the people, and of the great increase in the commercial business generally of the city of Washington, the other stations and warehouses owned or used by the complainant, have become and are in-

sufficient, both in number and in capacity, to furnish the proper facilities for the management and conduct of the said business.

That in order to reach this property with the least possible obstruction of the public streets, the complainant propose and desire to cross 14th street from its property (square 267) lying immediately east; this, however, is not necessary; the sidings can be laid along Maryland avenue in a curved line, and cross over the open paved space, constituting a part of the public street at this point, and lying between the main track of the company and the square.

That the defendants being advised of the purposes of the complainant, threatened and still threaten to prevent the company from laying any sidings whatever leading from its main tracks into this square, and to use the police force of the city of Washington for that purpose.

The defendants interposed a general demurrer to the bill, and the cause having been set for final hearing and having been argued by counsel, the bill was dismissed with costs. From this decree the complainant appealed.

ENOCH TOTTEN for complainant :

The learned judge, holding the Special Term, was of the opinion that this parcel of land was too remote from the main line of the railroad on Maryland avenue to be within the scope of the statutes comprising the charter of the company. He declared that the complainant clearly had a right to construct and use warehouses, stations and works in this city, necessary for the proper management of its business, immediately along Maryland avenue, and connect them with the main track by sidings. He instanced square 267, to which a siding has been laid and maintained, but he assumed that square 233 did not actually abut upon the building line of Maryland avenue, and that therefore this right did not exist as to that square, and decided that the railroad company had no authority to reach this property by laying tracks either across Fourteenth street or over the street space lying between the main line and the property.

ty. This, I submit, was a very narrow and strained construction of the statute, and it is unreasonable and erroneous. It cannot be said, upon any fair construction, that a siding extending from the main tracks on Maryland avenue, in a curved line to this piece of ground, would pass over any part of either Fourteenth or Water streets. But it seems to me wholly immaterial whether we call this street by one name or by another. This intervening ground is adjacent to the street and connects the square with it. But it is submitted to the court, that if it be true that the greater includes the less, such a siding would fall wholly on Maryland avenue. The space lying between the main track and this square is formed by the junction of the three streets at this point, and it may as well be called Maryland avenue as Water street, and it is no more Water street than Fourteenth. If this be not so, then by parity of reasoning the whole space to the width of eighty feet at the head of Long Bridge is Water street, inasmuch as Water street extends along the entire river front. It may also be argued that the company has no right to extend its tracks across this space, thus called Water street, to reach Long Bridge, because no authority can be found in the statutes to cross Water street.

The same reason may be applied against the right of complainant to pass over any transverse street. This is especially so at the junction of C, Seventh, Eighth and Ninth streets, with Maryland and Virginia avenues.

It may as well be said that the company is without right to construct its tracks over the very large space created by the intersection of these streets, as to say that it is without authority to cross the space in front of square 233. This space, at the junction of Maryland and Virginia avenues and C, Seventh, Eighth and Ninth streets, is about 380 feet wide by about 900 feet long.

An inspection of a map showing the various points at which the lettered and numbered streets intersect Virginia and Maryland avenues along the line of this railroad will

show a large number of spaces of irregular shapes and of different sizes, formed by such intersections.

It seems to me that it can be conclusively established, both by reason and authority, that the construction put upon the statutes by the court below was erroneous. I have carefully examined all the authorities, which a most diligent search enabled me to discover, and in every case, where a similar question was involved, the decision has been in favor of the right of the company to exercise the power here claimed.

It will not be denied by any lawyer at this bar that this space in front of square 233 is a part of a public highway or highways, and that the fee simple title thereto is in the United States. The United States may dispose of it in such manner and for such uses and purposes as the legislative branch of the government may deem expedient or proper. *Van Ness vs. City of Washington*, 4 Peters, 232. An ordinary municipal corporation, even where the fee of the street is in the abutting owners, may grant the use of the street for railroad purposes. *Barney vs. Keokuk*, 104 U. S., 324; S. C., 4 Dillon, 593.

The attention of the court is invited to the following wholesome and advanced doctrines on this subject, declared by the Supreme Court of Pennsylvania:

"The right of the Supreme legislative power to authorize the building of a railroad on a street or other public highway, is not now to be doubted. It has been settled, not only in England, but in Massachusetts, New York, and in Pennsylvania. If such conversion of a public street to purposes for which it was not originally designed, does operate severely upon a portion of the people, the injury must be borne for the sake of the greater good which results to the public from the cheap, easy and rapid conveyance of persons and property by railway. The commerce of a nation must not be stopped or impeded for the convenience of a neighborhood. But we can say this only in cases where the authority has been given by the sovereign power of the State. That any private individual

ial or incorporated company, not empowered to do so by an act of the legislature, can take possession of a street and make a railroad upon it without being guilty of a criminal offence, is a proposition which I am sure no lawyer would ever dream of making. The right of a company, therefore, to build a railroad on the street of a city, depends, like the lawfulness of all its other acts, upon the terms of its charter. Of course, when the power is given in express words, there can be no dispute about it. It may also be given by implication; for instance, if a company be authorized to make a railroad by a straight line between two designated points—this implies the right to run upon, along or across all the streets or roads which lie in the course of such line; so, also, when an act of incorporation directs a road to be made between certain termini, by such route as the grantees of the privilege shall think best, it may be located on an intervening street or other common highway if, in the judgment of the directors, it may be necessary or expedient to do so.”

The Court of Appeals of the State of New York,, speaking on a kindred subject, used the following language:

“To make out a case within the statute under which this proceeding is instituted, the land, the acquisition of which is sought, must be ‘for the purposes of the incorporation, or for the purpose of running or operating the road’ of the petitioner. What may be required in the exercise of this power has been defined by this court in several cases. In *re* N. Y. & H. R. R. Co. *vs.* Kip, 46 N. Y., 546, it was held that the only limit of the grant of power sought to be exercised under the act, is the reasonable necessity of the corporation, in the discharge of its duty to the public. See, also, *In re* B. & A. R. R. Co., 53 N. Y., 574, where this principle was endorsed, and it was stated that there must be an evident and apparent absence of all occasion or necessity for the property for the legitimate purposes of the corporation.”

In the case of *The Tenn. & A. R. R. vs. Adams*, 3 Head, 597, it was held that whilst railroad companies are to be

confined within the privileges granted by their charters—

“Yet this rule of construction is not to deprive them of the benefit arising from the obvious sense of the charter, and, moreover, whatever is essential to the enjoyment of the thing granted will be, necessarily, implied in the grant.”

The court in that case further declared that:

“The power to come within the city of Nashville carries with it, by implication, the power if need be, to locate the road upon a street or alley; for instance, if a company is authorized to make a railroad, by a straight line between two designated points, this implies the right to run up, along, or across all the streets or roads which lie in the course of such line. So the power to enter the city, of necessity, gives the right to locate the road somewhere, and if need be, upon a street or alley.”

In the case of the Commissioners of Long Branch *vs.* The West End R. R., 29 N. J. Eq., 566, a bill was filed praying an injunction to restrain the defendant company from (amongst other things) laying its tracks on a certain public street, and thereby occupying it to an unnecessary or unreasonable extent.

The court, in its opinion, said:

“It cannot be doubted that the defendants, in the construction of their road, have a right to occupy the highway to the extent of a reasonable necessity. Such right may arise by implication.”

In this case a question was made whether the track should pass over the street longitudinally, or at right angle in connection with a curve. The court denied the injunction and left the company at liberty to cross according to its own plan.

In *State vs. Morris & Essex R. R.* 25 N. J. L., 441, it was held that a railroad company might be proceeded against by individuals for obstructing a public street by its depot and its surroundings, and that a railroad company was bound “so to locate the depot that they could receive and discharge freight and passengers without injuriously interfering with the use of the highway by the public.”

And see the opinion of Shaw, C. J., in the case of the *Inhabitants of Springfield vs. Conn. River R. R. Co.* 4 Cush., 70, a case not unlike but much stronger against the claims of the railroad than is this one.

In a case in the Supreme Court of Pennsylvania involving the right of a railroad to construct as a part of its road a turnout or siding connecting its main line with manufacturing or mining establishments, a right far more extensive and important than is claimed here, that court declared the law of that State to be in favor of the right, and said:

"We cannot assent to the opposite contention, which holds that a side track which leads only to a manufacturing or mining establishment, held in private ownership, is illegal, because it does not subserve a public use. These establishments are very numerous, especially in Pennsylvania, along and near a line of railroad. They serve to develop the resources of the State, they give employment to vast numbers of citizens, and constitute a most important element in the general wealth and prosperity of the community; convenience and consequent cheapness of transportation, are, in most cases essential, and in many, vital to their maintenance. Moreover, considerable portions of the general public are directly interested in the traffic which goes to them, and in that which comes from them.

"Hence, in the connection in which we are now considering them, we cannot regard them as merely private interests, and, therefore, without the pale of that public use for which private property may be taken in the construction of railroads lawfully established and actually used for public purposes." *Getz' Appeal*, 96 Penn. St. See, also, *Harvey vs. Thomas*, 10 Watts, 63; *Sherman vs. Buick*, 32 Cal., 241; *Brewer vs. Bowman*, 9 Ga., 37; *Robinson vs. Swope*, 12 Bush., 21; *Cleveland & P. R. R. Co. vs. Speer*, 56 Pa. St., 332; *Pittsburg vs. Pa. R. R. Co.*, 48 Pa. St., 359; *Prather vs. Jeffersonville R. R. Co.*, 52 Ind., 16.

The many tracts of land of peculiar and irregular shapes above referred to, along the line over which this company was permitted to construct and maintain its railroad, must

have been taken into consideration by the legislature when the authority was granted, and they were intended to be utilized for stations, turnouts, &c., &c. There are, also, along the line of the railroad from the canal to the river, nine of these spaces: at South Capitol street; at Delaware avenue; between 2d and 3d streets; between 4½ and 6th streets; between 6th and 10th streets; at 10th, 11th, 12th and 13th streets.

The spaces created by these various junctions were intended by the act of Congress to be included in the designation of the particular streets which help to form them, and it will not do to segregate a small part of one of these spaces and call it a part of a lettered or numbered street in order to argue that the company has no statutory authority to pass over it. If this can be done, then the company has no lawful right to cross over any of these spaces.

The act of Congress authorising the company to extend its track over the Long Bridge, "and connect with any railroads constructed or that may hereafter be constructed in Virginia, requires, in peremptory language, that the company "shall give other railroad companies the right to pass over said bridge" on terms. This, of course, involves a corresponding increase of track-room, car-yards, and freight-yards.

It seems to be well settled that when a railroad company is authorised to occupy the street of a city for its road, it possesses the right, as a necessary incident, to make a "turnout" within the limits of a street to communicate with a depot (R. R. vs. Municipality, 1 La. Ann., 128), and authority to construct a railroad includes, *ex vi termini*, such additional sidings and branches to their depots, wharves, &c., as are made necessary by increase of business. All power to construct and maintain a railroad necessarily includes power to build depots, stations, side-tracks, engine-houses, switch repair shops, &c., &c. *Enfield Toll Bridge Co. vs. Hartford & N. H. R. R. Co.*, 17 Conn., 454; *Black vs. Phil. & R. R. Co.*, 58 Pa. St., 249; *Turnpike Co. vs. Camden & Atlantic R. R.*, 2 Harr., N. J., 314; *Duncan vs. R. R. Co.*, 94 Pa. St., 435;

e Sup. R. R. Co. vs. U. S., 93 U. S., 453; *Cathron vs. R. R.*
2 Phillips, 469 (Eng. Ch.); *P., W. & B. R. R. Co. vs.*
liams, 54 Pa. St., 103; *Com. vs. Haverhill*, 7 Allen, 523;
edo & W. R. R. vs. Daniels, 16 Ohio St., 390; *N. Y. & H.*
t. vs. Kip, 46 N. Y., 546; *Protzman vs. R. R. Co.*, 9 Ind.,
 ; *Speer vs. R. R. Co.*, 56 Pa. St., 325.

he original charter provides that the company—

May enter upon and use and excavate any lands which
 be wanted for the site of said road or the erection of
 ouses or other works necessary for the said road, or for
 onstruction and repair, and that they may build bridges,
 scales and weights, lay rails, may take and use earth,
 el, stone, timber, or other materials which may be
 ded, for the construction and repair of the said road or
 of its works, and may make and construct all works
 atever, which may be necessary and expedient in order
 he proper completion and maintenance of the said road.”
 f the company may enter upon and use “any” lands
 ich may be “wanted” for warehouses or other works, why
 uld it not be allowed to enter square 233? Is it because
 square does not actually touch an imaginary building
 of Maryland avenue, if there was no Water street or
 rteenth street here? If this square could not have been
 chased, could it have been condemned under the statute?
 he Supreme Court of Indiana, speaking on this very
 ject, said:

At the termini of railroads, depots are necessarily
 ted; at these depots the main business of the roads must
 discharged; trains of freight and passenger cars and
 motives must be kept in reserve, and must stand while
 ng loaded and unloaded, &c. In short, about a depot,
 ks must necessarily be extended on every side for the
 mmodation of the company and the public in the trans-
 on of business, and companies have the implied powers,
 er their charters, to make such as are reasonable and
 essary; we think an extension of 200 rods of such an
 ortant business road as we know that in question to be,
 not unreasonable; lands may be taken for depots, as

well as for roads, of which they are a necessary incident." *Protzman vs. R. R. Co.*, 9 Ind., 469.

The distance proposed to be traversed here is only 200 feet from the main line. If this is an unreasonable length of side-track, how far may the company go?

The only limitation on the right of the company to be found in the statute as to occupying property, is in the third section of the act of 1867, which prohibits the "entry" by the company on "any lot or square, or upon any part of any lot or square owned by the United States," to locate or construct its road or to "excavate."

Congress authorized the company to acquire and hold property for its depots, stations, &c., and it can hardly be held that there was no legislative intention to permit the company to use them. Some of the authorities have gone a great way in the construction of statutes, in order to allow railroad companies access to the depots, &c. *Black River Import. Co. vs. La Crosse Co.*, 54 Wis., 659; *State vs. R. Co.*, 3 Ind., 421; *R. R. Co. vs. R. R. Co.*, 8 C. S. Green, 157; *Davis vs. R. R. Co.*, 1 Sneed, 94; *U. S. vs. Bridge Co.*, 6 McLean, 517; *Rorer on R. R.*, 489; *R. R. Co. vs. R. R. Co.*, 23 N. J. Eq., 157; *Hughes vs. R. R. Co.*, 18 Fed. R., 106; *U. P. R. R. Co. vs. Hall*, 91 U. S., 346-354; *R. R. Co. vs. Gas Light Co.*, 63 N. Y., 326; *Chi. & W. R. R. Co. vs. Dunbar*, 100 Ill., 110; *Houston & Texas R. R. vs. Odum*, 2 Am. and Eng. R. R. Cases, 3 Texas 503; *Rio Grande R. R. Co. vs. Brownsville*, 45 Texas, 88; 10 John., 388; 52 Ga., 245.

The power of determining whether or not depots and stations are necessary and expedient, and where they shall be erected, is by the statute confided to the president and board of directors of the company, and when they have once exercised that power in good faith, their judgment is not reviewable, but is conclusive on all authority in this District, except that of Congress. *Ford vs. Ch. & N. W. R. Co.*, Wis., 663; *N. Y. H. R. Co. vs. Hip*, 46 N. Y., 546; *Giesy vs. R. R. Co.*, 4 Ohio St., 308; *Brainard vs. Clapp*, 10 Cush., 6; *Curtis vs. R. R. Co.*, 14 Allen, 55; *Pierce on Railways*, 148, 160, 494; *Hawley vs. Steele*, 6 Ch. Div., 521; See *Speed vs. U. S.*, 8 Wall., 83.

If the company cannot secure the use of grounds within the limits of the city and adjacent to its line of track necessary for warehouses, depots, stations, how can it accomplish the object for which it was ordained? It may as well be excluded wholly from the city.

The act of Congress of June 21, 1870, authorizing the company to extend its railroad along Maryland avenue and on and over the Long Bridge, require the company to repair the old bridge then existing, and to "erect and maintain the drawbridges so as not to impair the free navigation of the Potomac River, and in efficient working condition at all times." It also required the company, in order to accommodate travel and traffic until the needful changes in the bridge should be made, to repair all damages to the (then) present bridge, and maintain it. The act also requires the company to accord to other railroad companies the right to pass over the bridge. The company having complied with these requirements, stands in the attitude of a purchaser for an adequate consideration, and is entitled to a liberal construction of the statute, and to an unembarrassed use of its privileges. *Southern R. R. Co. vs. Screven*, 45 Ga., 613; *Turnpike Co. vs. State*, 94 U. S., 63.

It is therefore submitted, that the decree of the Special Term should be reversed, and that the injunction as prayed should be ordered.

A. G. RIDDLE for defendant:

This whole matter may be summarized under two general heads:

I. Has the railroad company the right to construct a track from its main stem to its property—square 233—across Fourteenth street?

II. Have the Commissioners of the District of Columbia a right to prevent such action by the plaintiff?

To a correct apprehension of these questions, two other things are necessary to be first considered:

First. As to the *locus*.

To cross, as proposed, is to traverse Fourteenth street directly.

To enter square 233 by side tracks, as suggested, is to traverse a space—parts of Fourteenth, Water and E streets and Maryland avenue—in common. This is not involved in the case, however.

For the law protecting open spaces—public streets—from use by any private person for any purpose whatever, see Sec. 222, Rev. Stats. D. C., pp. 25, 26.

Section 224 prohibits the use of streets by street railroads without express authority from Congress.

Section 226 requires all obstructions of every kind to be removed from all streets, avenues and sidewalks improved by aid from the United States, as these streets were.

Section 227 requires suits to be instituted against all parties so obstructing streets, avenues and sidewalks.

Section 229 denounces a penalty against any person obstructing such street, avenue or sidewalk.

Such is the *locus* and such the law protecting it.

Second. What are the duties and powers of the appellants Commissioners in the premises?

Section 77, Rev. Stats. D. C., places all streets, avenues, sidewalks, alleys and sewers within the entire control of the Board of Public Works, created by the act of February 11, 1871.

Acts of June 20, 1874 (18 Stats., 116), and of June 11, 1878 (20 Stats., 102), confer these powers and duties upon the present Commissioners.

I. Now, how fares the first of our two propositions.

The land dedicated to the public as a street confers upon the public a paramount right, over and above all others, to which even the sovereign can dedicate it.

Congress can lay upon it an additional servitude subordinate to this paramount right of the public.

Whoever claims that Congress has laid upon it this additional burden in derogation of the public right, must show it by unequivocal grant, express or implied. No one questions these propositions.

Congress granted to the plaintiff the right to lay its tracks along Maryland avenue to and over the Long Bridge. This

bring the plaintiff within 200 feet of the nearest point of square 233. That is to say, Congress came within 200 feet of authorizing the plaintiff to lay a track to square 233.

And the plaintiff comes within a little over 12 rods of making a case for an injunction—stating the case with rude succinctness.

II. As to the second—

The plaintiff gave formal notice that he would appear at the point indicated and lay its track across Fourteenth street at the named time.

a. It had no shadow of a right to do so.

b. It was a punishable offence to do it.

c. The *locus* was specially within the power of the Commissioners, under authority of the United States, whose duty was to prevent the threatened invasion of it by the railroad company. And they did; will continue to do so, unless restrained by the court, or until Congress grants a license to the plaintiff to lay its track as proposed.

The claim of the appellee is, that the right to enter and reverse a portion of the city gives it by necessary implication a right to acquire property convenient for warehouses and depots in the city, and construct the necessary tracks to them and across a street for this purpose, if necessary.

a. To this it is urged that, to indulge this implication, it is necessary to cross a public street which express statute law has dedicated to a paramount public purpose, which this implication cannot repeal, overcome or modify. An implied grant of this character cannot prevail against an express grant.

b. That in no event could this implied right to cross a street be allowed, except upon the clearly shown right to establish warehouses and depots in the city, and that no other site for them than that proposed can be found.

The bill makes no such case of necessity.

Mr. Chief Justice CARTER delivered the opinion of the court.

In the case of the Baltimore & Potomac Railroad Com-

pany against James B. Edmonds, Joseph R. West and Garrett J. Lydecker, Commissioners of the District of Columbia, we have a bill in chancery instituted by the complainant against the defendants for obstructing the exercise of their rights as a corporation in building a railroad track to square No. 233, ground which the bill avers the company has purchased for the purpose of the convenience and necessities of the railroad "for warehouse and other purposes."

It is claimed by the bill that the complainants are authorized by legislative power to do this thing; that they had a sovereign grant of Congress to this end. On the other hand it is claimed by the respondents, that the exercise of this assumed right is an invasion of the dedicated rights of the public to the streets of the city of Washington, and that the respondents, as guardians of the public rights of the citizens of Washington, were in duty charged with preventing it, as they have thus far done. Over this question of power arise the issues of this case, and it is a very serious case too. It is a grave case in the exercise of the political sovereignty of the District. It is a grave case when considered in the light of the construction of the corporate power of this corporation. And what renders the case graver, is the serious attitude that has been assumed with reference to it. A corporation has attempted to exercise its corporate rights, and the municipal authority has arrested it by the intervention of the police force. This is what the bill complains of.

It is not a contested question that Congress has the sovereign power to dispose of this matter as it will, under the Constitution of the United States. As the municipal authority of this District, under the Constitution, it had the power to permit the advent of this railroad into this District for commercial purposes. In exercising its municipal sovereignty over the District in the light of the same constitutional authority, they had the power to ordain a political sovereignty here in guardianship of the streets. The whole subject was within the control of the law making power, and over that question no issue is taken in the argu-

ment of the case. It is not a question of the existence of the power, but of its exercise, and the limitations of the exercise of that power. The complainant in this case starts out with the proposition that they have a plenary right to do just what they are doing.

Entering into the act of incorporation of the road by authority of Maryland, and repeated again in the authority given it by Congress to enter this District, we are pointed to this language as vindicative of the plenary power conferred upon this corporation for commercial purposes:

"The said road when completed not to be more than sixty-six feet wide, except at or near its depots or stations, where the width may be made greater, with as many tracks as the president and directors may deem necessary."

It is claimed on the one hand that here is a plenary grant to make this road at least sixty-six feet wide for commercial purposes. It is claimed on the other hand that this grant is qualified by the fact that it contemplated the rural existence of the road, and not its city existence. But the language is re-enacted by Congress in the terms they found it, and as far as it is capable of application to the condition of the District, it is the text of authority to the end for which it was designed.

Again, the court is pointed to the further language:

"And they or their agents, or those with whom they may contract as their agents, may enter upon and use and excavate any lands which may be wanted for the site of said road or the erection of warehouses or other works necessary for the said road or for its construction and repair."

It is said that here is the plenary grant not only to enter the District with the road, but to erect any works essential to the prosperity and purposes of the corporation. And it is very difficult to conceive how broader language could be used—more ample phraseology to an end.

Here was a railroad running into the capital of the nation for its convenience and for the convenience of the public who might seek this centre of political power. Congress had seen fit to grant an act of incorporation for this purpose,

and evidently they intended it should answer the purpose for which it was designed, a public convenience, and provided that they might erect any works essential to the operation of the road.

How language more ample, more significant and comprehensive can be used than they have used here, it is difficult to imagine. It is as ample as the necessities of the subject. It is as ample as the reasonable conveniences of the subject. It is as ample as the commercial demands of this centre, through the agency of this road, could require. And we do not know that this proposition is controverted as an abstract proposition, for we have not met the subject of chief difficulty.

Again, we are pointed by the complainants to another passage in the act manifesting the same intention on the part of the law-makers:

"And may make and construct all works whatsoever, which may be necessary and expedient in order to the proper completion and maintenance of said road."

Now, inasmuch as "all" embraces the constituents of all, inasmuch as the larger embraces the lesser, and inasmuch as you cannot contemplate anything that is not covered by "all," it is claimed by the complainant in this case that they have the power to make "all" the necessary roads. A more plenary grant never was issued to a corporation. The corporation would have been empowered to do this without this phraseology, if it had not been named at all; if Congress had not taken the special pains to enumerate that they should construct "any and all works necessary" to this road, the law would imply it. The law creating a corporation with commercial powers and purposes, and revealing the commercial powers and purposes of its creation in the terms of its creation, carries with it all the implications that follow that grant, and there is no principle in the construction of corporate power better settled than that the clear expression of power brings with it all implications that are embraced in it. Even without this phraseology, the power of the corporation would have been complete to do this, and we

do not know that this is seriously controverted by the defendants; we have not heard it seriously controverted. We have not met the point at issue, yet, in this case. These considerations are considerations of authority and power that the complainants have tendered to the deliberation of the court as covering what they did. And the argument in response is, not that they have not this power, nor that this commercial grant does not carry with it all of the authority essential to its practical execution; but it is insisted that they are departing from it, going away from it, and beyond the grant of power, and seeking for their license outside of authority, and therein are invading the guardianship permitted to the Commissioners of the District over the highways of the District. There lies the point.

The language of the defence is practically this: You may come into the District of Columbia as Congress has authorized you to do. You may cross all the streets, from one to twenty-one, in traversing the District from one border to the other, doing no unnecessary damages, and interposing no unnecessary obstacle in doing it. You may do all that. But you shall not cross a street or depart from the line of your transit to build a depot, or to build a warehouse or a workshop, or a locomotive stable. You shall not command authority to cross a street for any of these purposes.

Now, it is not necessary for the court here to adjudge that the power exists to cross a street for the determination of this case, for here we have a mere proposition to leave the avenue and pass over a highway, or a country dedicated to a highway, and to the first ground to be found of a private character. Within the track of the railroad, within the limitations of the street upon which the track of the railroad traverses, and without it, and within the border of the square that is proposed to be occupied, there is none but highway.

There is that undefined, ideal line between Water street and Maryland avenue, that is ascertained by the projection of Maryland avenue, or the line of Maryland avenue, or emptying out of Maryland avenue into Water street, whichever you please; it is "street" all the while, and it is the

street that would answer to the integrity of their action in the light of seeking contiguous property for incorporation purposes. It is contiguous, for it is the nearest property in approach to the line of Maryland avenue that you can find, and you go over no other property to reach it.

Our streets are peculiar, as the geography of the city demonstrates. We are furnished with right-angled highways, right-line highways, and we are furnished with oblique and acute angles; we are furnished with spaces, and we are furnished with that undefined marriage of highways with each other, and you cannot tell where the ceremony transpired, except by an imaginary line; and upon the border of this enlargement lies square 233, and this company is charged with the offence of overleaping the boundaries of corporation authority in taking the first land that they can reach over a highway.

It is perfectly obvious that in the sense and substantial intentment of Congress, even if they were confined to contiguous property for the display of depot or warehouse work, they have substantially complied with it in this instance. For it is the substance of the thing that the law is pursuing, and not its shadows. This corporation was incorporated for practical commercial work. These highways were pointed out in the correlation of that work, and if they cannot approach the site of highways where they mingle with each other to get to land, or to get to private land, you have practically defeated the purposes of the act of incorporation and we think if the doctrine of contiguous territory obtains as in the instance of this bill, this company has practically and fairly observed it in seeking block 233 through Water street, if that is the name of it, to its border.

But that does not satisfy my conclusion about the authority granted by this act of incorporation, individually. I only speak for myself in this. Here is an express provision in the original charter, re-enacted into the extending of the road into this District, and re-enacted again in extending the road through this District, that the corporators may cross the public highways of the District.

Now, is it rendered, in the restricted sense, a right to cross it in the transit of the main line?

Not at all. The right to cross the highways is a right co-extensive with the legitimate necessities of the corporation, whether those necessities are manifested in the movements of a locomotive upon the line of transit, or manifested in its reaching out its short arms to warehouses, to locomotive stables, and to depots. They are as much identified with and coherent in the structure of the railroad as the main line, and all the phraseology applicable to the *termini* that is pronounced upon the main line, is applicable all the way through. You cannot distinguish in the power. If one block is not large enough to accommodate the depot conveniences or necessities of a road, the same authority that permits them to cross a street in the transit of a road, permits them to cross a street in seeking another block most convenient to the one that they occupy, for the purpose of perfecting the conveniences and necessities of the road. And why not? Legislation is an intelligent exercise of power, working to a purpose. In this instance it is an exercise of power working to the purpose of accommodating this District with commercial easements in bringing the people and their products to it, and taking the people away from it, and it has not discharged its functions until it does it, and it cannot discharge its functions properly until it is equipped with all the appointments necessary to do it, and the appointments occupying these squares are just as necessary as anything else.

But it is said they may wander all over your city, if that be the case. No, it does not follow at all that they may. There is no such vagrancy encouraged by the theory at all. They can follow just as far as the necessity, the reasonable necessity of the subject requires, and therein is interposed the guardianship of the courts. The courts, under all the authorities that have been presented, are invoked at this point to ascertain whether they are following vagrant ways, or whether they are legitimately enacting the functions of their authority, and there is where the whole matter rests;

there is where the whole matter rests in this case. Is this a reasonable appropriation of corporate power to the end of commercial necessity? And it is the only question, in my judgment, that appeals to the power of the court. It is not a question of squares; it is not a question of streets. It is a question of propriety in the squares and propriety in the streets. But these are my individual views of the subject, and I do not wish to charge them over to the account of the court; especially as the other proposition is ample to cover the ground that the court has unanimously taken.

This court, from time to time, has been called upon, in administering the fate of this road judicially, to clean out the streets from one end of them to the other. It has told this company that they should not stop in the streets. It has said: "You shall not unload your freight here; you shall not load it; you shall not make a stable of this street for your locomotives or your cars; or let out offensive stock to stand here." The court has cleaned up this Maryland avenue from one end to the other, by decree and judgment, until this corporation is pretty much ruled out of these streets, except for transit. They can move through them, but they cannot stop on them for freight or depot purposes. Well, we have got them out of the street, and now what happens? The guardians of this road come into court and tell us that they are not permitted to go anywhere else.

What is the effect of all this, except to repeal the act of incorporation which created the company? "You cannot do anything in this street; you cannot do anything out of the street, because you cross a street, or because you cross 200 feet of undefined street occupied for nothing else." The result of it would be, as is perfectly obvious to everybody, to cripple and defeat the objects of the corporation, and to defeat the ends of public interest, as well as to defeat the ends of Congressional purpose, if it is carried out.

Why, it is said, they can go somewhere else. Well, it does not appear in this case that they can. All the testimony before us in this case is to the effect that square is eminently the proper place for it. Even counsel say that

authority will permit them to pass a street, they cannot stowed away any better that they know of than on square 3; and anybody who looks at the geography of the locality will see that it is pre-eminently the proper place, because it is right on the skirt of population—beyond it is a marsh which has been inhabited for seventy years by nothing but weeds. It is a common dumping ground. It is a swamp. And if there is any place inoffensive to public taste, it seems to us that they have found it here. There is no neighborhood to be discommoded by it. A large body of substantial business men, reflecting the commercial interests of the district, by testimony, say that this is eminently the proper place to put this road into stable, and hope that the Commissioners will permit it to be done.

These views, generally expressed, have operated with the court to grant the injunction prayed for in this bill, and to permit this company to go on its way.

Mr. Justice JAMES said:

The question is simply one of construction of the charter. Congress has said that the tract shall not be wider than thirty-six feet, except at the depots and stations, and has provided for taking land necessary for the purposes of the road. The implication is that the depot grounds are to be along the line prescribed. In applying this to the peculiar plan of Washington, I have arrived at the conclusion that the company is authorized to take and use for depot purposes, any lots between the front of which and the line of the road no other lots intervene. For the purposes of this act such lots may be said to front upon and lie along the road. This would give authority to use as depot grounds, with the turnouts necessary to reach it, a lot which fronts, as the lot in question does, towards Maryland avenue, although, by the excess caused by the intersection of several streets, it does not touch that avenue. It is unnecessary to consider in this case complainant's argument that the charter authorises it to take, and construct approaches to, even a second tier of lots, not fronting in any sense on Maryland avenue, in case they should be necessary.

MR. RIDDLE said: I will take leave to answer this bill, as you simply overrule my demurrer. I have some very grave questions which I wish to present to this court before the matter is finally disposed of.

After a short discussion between Mr. Riddle and Mr. Totten, the Chief Justice said:

THE CHIEF JUSTICE. We would rather the motion should be reduced to writing, with the reasons for it, and if those reasons are a new discovery of facts, or a contradiction of facts, we will advise concerning it. But the law cannot be reviewed again here. This decision is final, so far as this court is concerned, with reference to the law of the case.

MARTIN KEEFE vs. WILLIAM L. BRAMHALL ET AL.

EQUITY. No. 8712.

{ Decided March 16, 1885.

{ The CHIEF JUSTICE and Justices WYLIE and JAMES sitting.

1. A tax deed on its face amounts to nothing as proof of title until authority for making the deed is shown.
2. Where one enters claiming under color of title, and by length of adverse possession, gains a good title, he will hold according to the metes and bounds set out in his colorable title, although his actual possession has extended only to a part of the land claimed, and that is the only effect of color of title.
3. But, where the entry in the first instance is that of a mere trespasser, without colorable title, his adverse possession of twenty years gives him title only to the land he has actual possession of.
4. A tax deed void on its face does not even give a color of title.
5. Recording a void tax deed, and paying the taxes on the property, are not acts amounting to adverse possession.
6. The Statute of Limitations, in force in this District, in respect of real property is that of 21 James, chap. 1, section 16, and under it there must be twenty years actual, open, notorious, visible adverse possession against all the world.
7. Equity will never interfere between two claimants to a piece of real estate, for the purpose of quieting title, unless the complainant shows a clear and indisputable title, but will leave him to any other remedy that he may have.
8. Equity will not presume strongly in favor of a tax title. A party who purchases a tax title, purchases with full knowledge that he is running a risk, and he is bound to know whether the tax title is good or not. He buys with his eyes open, and to no person does the rule *caveat emptor* apply more than to such a purchaser.
9. There is no presumption in favor of the validity of a title descended from a deceased ancestor unless the latter died seized of the property.

STATEMENT OF THE CASE.

The plaintiff being in possession filed his bill, September 19, 1883, to quiet title to the west half of lot three in square 780, in the city of Washington. He avers that he acquired title thereto by deed from Wm. B. Todd and wife, of July 8, 1870, and Todd acquired title by deed from Caroline H. Earl, of June 15, 1849, and she took under decree of partition of the estate of James McCormick, jr., of the Baltimore County Court, January term, 1846, and he derived title by tax deed from the corporation of Washington

city of May 12, 1841, the property having been sold November 19, 1827, for taxes for the years 1824, 1825 and 1826.

Two of the defendants are sued as trustees, and the others as the alleged heirs of James S. Stephenson, who died in the city of Washington about the year 1811. The bill alleges that the latter defendants claim to have inherited this property, together with a large quantity of other property in the city of Washington, from their said alleged ancestor, Stephenson, and undertook and pretended to convey an undivided half interest in the same to Anna T. Bramhall, wife of defendant Bramhall, by deed of November 23, 1882, the consideration recited being \$500. The bill avers that this conveyance was without any consideration, in fact is a fraud, and the property therein conveyed is actually worth many thousand dollars. And that the same defendants conveyed, or pretended to convey the other half interest in the same property to defendant, William L. Bramhall, by deed of the same date.

That Bramhall and wife, thus possessed of this half lot and some eighteen or nineteen other original lots, all situated in the city of Washington, reconveyed the same to the defendants herein named, the said grantors in the two deeds mentioned, by deed of February 17, 1883; and by deed of the same date, they, in turn, conveyed to Bramhall and Baker, trustees.

That the title to plaintiff's property is thus clouded by these pretended conveyances, and that defendants refuse to bring an action of ejectment to try their pretended title. The plaintiff being without any adequate remedy at law, therefore brings his bill in equity to quiet the title to the property in controversy, and asks for judgment against the defendants for damages in the sum of \$250.

The defendants answering averred that the title of the plaintiff was founded on a tax title, and was null and void, and the record so showed the same; that the said west half of lot 3, square 780, was not inclosed, nor was any dwelling erected thereon until 1870; they denied that the plaintiff and those under whom he holds have paid taxes thereon for

more than fifty years, and have exercised all the rights of property in and to the same against all persons, and particularly against the defendants, as alleged in the bill; that said lot was vacant, unoccupied, uninclosed, and in the possession of no one until 1870, when the plaintiff took possession and erected a humble dwelling thereon; that the other defendants are grandchildren of the said James S. Stephenson, who died about the year 1811, and that they inherited, among certain other lots, the property in question, and they show a regular sequence of conveyances from the original proprietor to their ancestor.

The conveyances to Bramhall and wife, and reconveyance to the defendants, and their conveyance to Bramhall and Baker, trustees, as alleged in the bill, were admitted; but they averred that the conveyances to Bramhall and wife were for a valuable and sufficient consideration, and divested of all fraud, and allege that upon conference with the parties interested the said Mrs. Bramhall reconveyed for a full compensation to be paid, &c.; that the trustees have and possess a fee simple, title in and to the lot mentioned for the purposes of the trust; but, notwithstanding this, the defendant, Bramhall, offered to give the plaintiff a quit claim deed for \$100.

Issue was joined, and testimony being taken, the proof showed that the lot was purchased by the plaintiff of William B. Todd, in 1870, when it was a vacant lot, and it appears to have remained a vacant lot, uninclosed, from date of tax sale to date of sale by Todd to plaintiff in 1870, when the plaintiff erected a small dwelling thereon; that this property, with the adjoining lots, was a common, wholly unimproved until the Board of Public Works graded D street. The excavation in front of the lot made, in grading the street, is, or was, about seventeen feet deep. The property, as it stood, cost the plaintiff about \$2,500, and was fairly worth \$1,500. The taxes were paid up to date, the plaintiff having paid them since his purchase of Todd. The property was assessed since the tax sale or deed in the name of McCormick, Todd and the plaintiff. The defendants

since the tax sale have never paid any taxes on the property.

The tax sale took place in 1827; was for taxes due for the years 1824, 1825 and 1826. The price paid for the whole lot (of which only one-half was in controversy) was \$2.83. The tax deed under the sale was not given until about fifteen years afterwards, to wit, May 12, 1841. The bill did not allege that the tax deed was a valid one, but averred "that said tax deed is at all events at least a colorable title, and the complainant and his grantors having claimed thereunder for more than forty years, and having asserted all the while a right of property in the same as against all persons, and particularly as against the defendants, or either of them, and all persons who claim under, by or through them or either of them, he claims an indefeasible estate in and to said lot and premises."

At the hearing in Special Term the court dismissed the bill "without prejudice to either party proceeding at law."

J. G. BIGELOW for complainant:

The defendant's conveyances cast a cloud upon the plaintiff's title, who, being in possession, of course has no remedy at law against the defendants, and is, therefore, compelled to seek redress in a court of equity. This court unquestionably has jurisdiction. *Pierce vs. Webb*, 3 Bro. Ch., 16; *Hayward vs. Dinsdale*, 17 Ves., 111; *Byne vs. Vivian*, 5 Ves., 606, 607; *Mayor of Colchester vs. Lowton*, 1 Ves. & B., 244; *Attorney General vs. Morgan*, 2 Russell, 306; *Duncan vs. Worrall*, 10 Price, 31; *Jackman vs. Mitchell*, 13 Ves., 581; *Petit vs. Shephard*, 5 Paige, 493; *Van Doren vs. Mayor, &c., of New York*, 9 Paige, 388; *Fish vs. French*, 15 Gray, 520; *Sherman vs. Fitch*, 98 Mass., 59; *Sullivan vs. Finnegan*, 101 Mass., 447; *Bunce vs. Gallaher*, 5 Blatch. C. C., 48; *Clonston vs. Shearer*, 99 Mass., 209; *Woods vs. Monroe*, 17 Mich., 238—all cited in note 4, to section 700, *Story's Equity Jurisprudence*; and, *Eldridge vs. Smith*, 34 Vt., 484; *Hodges vs. Griggs*, 21 Vt., 280, cited in note to section 711a, *Story's Eq. Jurisprudence*.

These authorities effectually dispose of the question of jurisdiction.

The main question in the case, one purely of law, arises out of the following uncontroverted state of facts: James S. Stephenson, the ancestor of the beneficial defendants, died in the city of Washington about the year 1811, seized in fee simple to the lot in question. None of the defendants have labored under the disability of coverture, infancy, insanity, or any other disability to prevent the running of the Statute of Limitations.

The plaintiff's title is founded, first, in a tax title to McCormick of 1841; and second, in a decree of partition of his estate by the Baltimore county court, January term, 1846, assigning this particular property with certain other to Caroline H. McCormick, who afterwards intermarried with Earl. Then the property, by deed in fee simple from her of 1849, is conveyed to the late William B. Todd, deceased, and Todd conveys by like deed of 1870 to the plaintiff.

The lot in controversy is situated in square 780, fronts south on D street north, between Third and Fourth streets east. No public street or highway was opened up past this property or to it until the time of the Board of Public Works. It contains about 2,000 square feet of ground, and the excavation in front of it made by the said Board in grading D street was about seventeen feet deep. It, together with adjoining lots, remained a common, uncultivated, unimproved and uninclosed down to the year 1870, when the plaintiff, having purchased of Todd, erected a small frame dwelling thereon, before the grading of the street. After the street was graded, the plaintiff excavated the lot, and brought it down to the grade of the street, and built an additional story of brick under his house. This excavation and underpinning of his lot and house cost the plaintiff over one thousand dollars. The title of this lot has stood on the land records of the District in the name of the plaintiff and those under whom he claims, and been assessed and taxed for the purposes of the municipal government of the city of Washington and District of Colum-

bia, in their names, ever since the tax deed of 1841. The taxes have been paid by the plaintiff since 1870, and prior thereto they were presumably paid by Todd, and those under whom he held. At least they were not paid by the defendants. It may be stated as an obvious fact that this lot was never worth anything for agricultural or horticultural purposes to induce the owner to inclose it by a fence, or for the purposes of a building site, being inaccessible by any public improved highway or street, until the time of the Board of Public Works.

The facts are fairly stated, and the sole question is: Has the plaintiff a good title against the defendants? Has the Statute of Limitations barred the rights of the defendants to claim this lot?

The common law doctrine, requiring twenty years uninterrupted adverse occupation of real estate or land by an actual *pedis possessio* of it by fence inclosure, an actual cultivation, an actual improvement, or by an actual possession, in order to acquire title against the owner, is familiar to all.

The doctrine and the rule had their origin in the feudal system long before written deeds of conveyance were heard of, before charters and deeds of feoffment as memorials of the fact of livery of seisin were thought of; long before the establishment by law of public records for the recordation of land titles. The origin was at a time when the only method and means, recognized by the law as effectual to transfer the title to land, consisted of the ceremony called livery of seisin, performed in the presence of the assembled vicinage, when the grantor inducted the grantee into possession by the delivery of the symbolical twig and turf.

It is obvious that under such a system of acquisition and tenure of title, no adverse claim could be recognized, unless founded upon actual, open and notorious occupation or possession, for it was by such occupation or possession alone the fact of ownership could be determined. There were then no land records, as at the present day, in which title might be traced from one generation to another. But the

common law in this, as well as in all other respects, has been found plastic, moulding and adapting itself to the necessities and wants of man in a more enlightened and progressive age. Still retaining the original principle upon which it is founded, viz., public notoriety, it, nevertheless, no longer requires, in all cases, as a *sine qua non*, actual occupation by fence inclosure, cultivation, improvement or actual possession for twenty uninterrupted years to acquisition of title as against the owner.

Mr. Justice Baldwin said: "It is well settled that to constitute an adverse possession, there need not be a fence, building or other improvement made; it suffices for this purpose that visible and notorious acts of ownership are exercised over the premises in controversy for twenty-one years after an entry under claim and color of title. So much depends on the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule adapted to all cases. But it may, with safety, be said that where acts of ownership have been done upon land, which from their nature indicate a notorious claim of property in it, and are continued without interruption or an adverse entry by him for twenty-one years, such acts are evidence of an ouster of a former owner, and an actual adverse possession against him, if the jury shall think that the property was not susceptible of a more strict or definite possession than had been taken and held. Neither actual occupation, cultivation or residence are necessary to constitute actual possession, where the property is so situated as not to admit of any permanent useful improvement, and the continued claim has been evidenced by public acts of ownership such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim." *Ewing vs. Burnett*, 11 Pet., 52, 53.

(NOTE.—In Tyler on Ejectment, p. 892, the above is incorrectly quoted in the last two lines.)

Mr. Justice Story said: "The object of the law in requir-

ing actual seisin, was to evince notoriety of title to the neighborhood and the consequent burthens of feudal duties. In the simplicity of ancient times there were no means of ascertaining titles but by visible seisin, and, indeed, there was no other mode between subjects of passing title but delivery of the land itself by the symbolical delivery of turf and twig. The moment that a tenant was thus seized he had perfect investiture, and if ousted could maintain his action in the realty, although he had not been long enough in possession even to touch the esplees. The very object of the rule, therefore, was notoriety to prevent frauds upon the land and upon the other tenants. But in a mere uncultivated country, in wild and impenetrable woods, in the sullen and solitary haunts of wild beasts of prey, what notoriety could an entry, a gathering of a twig or an acorn, convey to civilized man at a distance of hundreds of miles? The reason of the rule could not apply to such a state of things, and *cessante ratione cessat ipsa lex*. We are entirely satisfied that a conveyance of wild or vacant lands gives a constructive seisin thereof in the deed to the grantee. It attaches to him all the legal remedies incident to the estate." *Green vs. Lister*, 8 Cranch, 249. See also *Ellicott vs. Pearl*, 10 Pet., 412; *Tyler on Ejectment*, 892.

"When an entry is made upon lands under color of title, the same may be held by *constructive* possession; but if made under a simple *claim* of title, the possession must be actual, a *pedis possessio*, definite, positive and notorious." *Tyler on Ejectment*, p. 893, citing *Bailey vs. Irley*, 2 Nott & McCord, 343; *Gibson vs. Martin*, 1 Harr. & Johns., 545; *Hoy vs. Perry*, 1 Litt., 171; *Hite's Heirs vs. Schrader*, 3 Ib., 456; *Braxdale vs. Speed*, 1 Marsh., 106; *Smith vs. Mitchell*, Ib., 207; *Skyle's Heirs vs. King's Heirs*, 2 Ib., 585; *Anderson vs. Turner*, 3 Ib., 133; *Bodley vs. Coghill's Heirs*, Ib., 615; *Moore vs. Farrow*, Ib., 49; *Trotter vs. Cassady*, Ib., 366; *Doolittle vs. Lindsey*, 2 Aikin, 155; *Tyler on Ejectment*, pp. 895, 896, and cases cited.

In delivering the opinion of the court in the case *Owings vs. Tiernan's Lessee*, 10 Peters, 442, Justice S

said: "It is wholly unnecessary for us to consider whether the instruction as given is maintainable in point of law or not, and the only question is, whether the refusal to give it as prayed for was correct; but this resolves itself into the point whether it is absolutely necessary to constitute a possession of land sufficient to bar an adverse title thereto under the Statute of Limitations limiting writs of right to thirty years, that there should be an actual residence or fence by the party claiming the benefit of the statute; that is, an actual residence on the land, or a *pedis possessio* of it by an inclosure. The argument in support of the instruction, as prayed, assumes that there can be no possession to defeat an adverse title except in one or other of these ways—that is, by an actual residence or an actual inclosure, a doctrine wholly irreconcilable with principle and authority. Nothing can be more clear than that a fence is not indispensable to constitute possession of a tract of land. The erection of a fence is nothing more than an act presumptive of an intention to assert an ownership and possession over the property; but there are many other acts equally evincive of such intention of asserting such ownership and possession, such as entering upon land and making improvements thereon, and raising a crop of corn, &c., under color of title."

"And a deed or some writing sufficient in form to carry the title to lands, when a title in fact exists, is an essential ingredient in a constructive adverse possession, set up to bar a recovery in an action of ejectment." Tyler on Ejectment, 895, and cases cited.

Such appears to be the law when the claim is founded in a colorable title, that is, on a written instrument sufficient on its face to pass the title, or when founded, as hereinafter shown, on a judgment or decree of a court having jurisdiction. If, however, there be no such written instrument, judgment or decree, on which to found the claim, the law requires actual possession, cultivation, improvement or inclosure for the requisite period to bar the rightful owner. Speaking on this point, Tyler on Ejectment, p. 891, says: "But it must be considered as settled, if a series of decisions

for sixty years can settle a question, that when the occupant of land produces no written title, but relies solely on possession with an assertion of title, he can retain so much only as he had under actual improvement and within a substantial inclosure. And the decisions are that the possession must be marked by distinct boundaries." Citing *Brandt vs. Ogden*, 1 Johns., 156; *Jackson*, 5; *Water*, 12 Ib., 365; *Jackson vs. Warford*, 7 Wend., 62; *Jackson vs. Halstead*, 5 Cow., 216.

"The doctrine seems to be, that when an usurper enters on land, he acquires possession, inch by inch, of the part which he occupies, and that a mere naked possession, without color of title, is adversary only to the extent of actual inclosures, which must be definite and notorious." Tyler on Ejectment, 894; *Hammond vs. Warfield*, 2 Harr. & Johns., 151; *Hall vs. Gitting's Lessee*, Ib., 380; *Jackson vs. Camp*, 1 Cow., 605; *Prevost's Heir vs. Johnson*, 9 Mart., 123; *Davidson's Lessee vs. Baker*, 3 Harris & McHenry, 621.

As to claim founded on a judgment or decree, see notes to *Ewing vs. Burnet*, 11 Peter, 41; Book 9, L. C. P. Co.

Tax title is, of course, a colorable title. *Blackwell on Tax Titles*, 566, 567.

If any authorities can be found not in harmony with the principles laid down in the foregoing cases, it will be found, upon examination, that they exist by reason of some statute prescribing what shall be deemed adverse possession. In some of the States such statutes have been enacted.

Applying the doctrine therein laid down to the case at bar, we find that the plaintiff, and those under whom he claims, have exercised all the rights of property in and to the lot in controversy since the year 1841, that any rightful owner would have exercised, considering the situation of the property and the purposes for which it was adapted; that he and his grantors have claimed openly and notoriously the same under and by virtue of the tax deed of 1841, and the decree of the Baltimore County Court, January Term, 1846, for forty years, and under color thereof have paid taxes thereon; that during all this time, the title has stood in their names on

he public land records of the District of Columbia, and been assessed and taxed in their names on the books of the municipal corporation; that the most evincive acts of ownership have been exercised over said property by them, viz., the deed in fee simple of Caroline H. Earl of 1849 to Todd, and like deed of Todd of 1870 to the plaintiff, and the improvement thereof by the plaintiff at the earliest practicable moment, by the erection of a dwelling thereon as soon as it was determined by the District government to open "D" street so as to give ingress to and egress from the property; that all these acts and deeds were performed and done under a clear claim of right founded upon a written deed sufficient on its face to carry the title, and on a decree of a court of competent jurisdiction.

Assuming that the tax deed has some inherent defect by reason of a failure on the part of the municipal authorities to comply in some slight respect to the strict requirements of the law, can it be doubted in the light of the authorities the plaintiff has a good and valid title as against the defendants after the lapse of more than forty years? The tax deed need not be valid to give colorable title. If it were absolutely valid, then there could exist no need of invoking the aid of the Statute of Limitations. The plaintiff will rest his case upon the law, and without considering the presumptions of the law in respect to the observance of the letter of the law in the making of a tax deed forty-three years ago. The very principle upon which the doctrine of acquiring title to land by adverse claim, viz., notoriety of the claim, conspicuously exists in this case. The registry laws of the District remands the public to the land records to ascertain who claims title to any particular lot within this jurisdiction, and no longer do we look to see whether a fence encloses a building lot, or even to see who is actually in possession, if we find a title of record, coming regularly down by a connecting chain of conveyances extending back for more than a half a century.

A little common sense and good reason will harmonize all this with the doctrine of feudal times on the same subject.

The plaintiff, it is submitted, is clearly entitled to have the prayers of his bill granted, viz., to have the hostile deeds cancelled, decreed to stand for naught, himself to be re-invested with his title, and the defendants enjoined, &c.

W. WILLOUGHBY for defendants:

It will be noted that the taxes for which it is alleged the property was sold, were for the years 1824, 1825 and 1826; that is, at least fifteen years before the date of the deed, the sale for taxes having taken place in the year 1827, fourteen years before the date of the deed. Is it not a significant fact that the purchaser did not ask for his deed for the period of twelve years after the time allowed by law for redemption? He did not seem to think it of much importance, as he did not take the trouble to have it recorded until April 12, 1842, a year after its execution, which, under the statute then in force, renders it worthless upon the face of the record. See *Greenleaf's Lessee vs. Birth*, 6 Peters, 314; *Rev. Stats.*, 1838, chap. 57; *Act of April 20, 1838*.

A tax deed not valid upon its face, is not a colorable title 11 How., 424; *Blackwell on Tax Titles*, 567-8.

But the alleged colorable title has other more apparent defects: The next thing in their chain of title is an extract from a decree in partition of the Baltimore County Court, Maryland, of an estate (alleged by complainant to be that of James McCormick, jr.) in 1846. It is not easy to see how, under the statutes, proceedings in a court in Baltimore county, Maryland, which provides for a partition of an estate within the county where the court is held, can determine title to real estate in the city of Washington, in the District of Columbia.

In 6 Cranch, 148, it is held that a court of equity may exercise jurisdiction in relation to lands outside of the State in a case of fraud, trust or contract, where it obtains jurisdiction over the parties. But it has no jurisdiction as to lands outside the State, in a case of unmixed question of title. Still less could this be so where the subject is of a statutory nature, and is purely *in rem*.

Such decree does not, therefore, furnish even color of title. It does not do this for other reasons. The extract does not describe the property as in Washington. Again, it does not appear that the said Caroline H. McCormick, therein mentioned, is an heir of James McCormick, jr., nor does it appear how she derives title from James McCormick, jr. His Caroline H. Earl conveyed her interest to William B. Todd, in the year 1849. He held it twenty-one years, and then conveyed to the complainant, July 8th, 1870.

Now, it is agreed that there was no occupation of this property by any one through whom the complainant claims, and he did not occupy it until after his purchase in the year 1870. He claims that there was no public improved highway until the time of the Board of Public Works. The highway was, however, laid out, and in common use, long before, and there was no obstacle to its occupation by anyone who desired to occupy it. In fact the complainant, himself, testified that he erected a dwelling house upon the property prior to the change of grade by the Board of Public Works.

The entire ground of complainant's claim of title is adverse possession. Such adverse possession, prior to 1870, is based solely upon what is alleged to be the presumption that the taxes prior to 1870 were paid by Todd, who is claimed to have held a colorable title from 1849 to 1870, a period of twenty-one years. There is no evidence as to who paid such taxes, and it is admitted that there was no occupation whatever by Todd, nor by complainant, nor anyone through whom he claims to have derived title.

The complainant quotes from Tyler on Ejectment, 893, that when an entry is made upon lands under color of title, the same may be held by constructive possession.

"To constitute adverse possession, there must be a visible, notorious occupation, a *possessio pedis*, attended with a manifest intent to hold it against the claim of all other persons." Angell on Limitations, secs. 391, 395.

The distinction between a mere intruder and one holding under color of title, is simply that the possession of the

former is confined to the land actually in occupation; the latter is co-extensive with the premises described in the paper under which he claims, and which he believes give him a good title. Angell on Limitations, sec. 400.

"Constructive possession is an incident of ownership, and results from title, and is in no way applicable to a case where the occupant defends himself avowedly and exclusively on the ground of his own wrong." Angell on Limitations, sec. 394.

"The principle on which the Statute of Limitations is predicated, is not that the party in whose favor it is invoked has set up an adverse claim for the period specified in the statute, but that such adverse claim is accompanied by such invasion of the rights of the opposite party as to give him a cause of action, which having failed to prosecute within the time limited by law, he is presumed to have extinguished or surrendered. * * * It is the occupation with an intent to claim against the true owner, which renders the entry and possession adverse." Angell on Limitations, sec. 390.

There must be a *disseisin*, an ouster, a wrong amounting to a trespass, sufficient to give a cause of action. Surely the payment of taxes, or a professed conveyance, does not constitute such a trespass as to give a cause of action.

The complainant has not proved that he paid any taxes prior to 1870, but relies upon the presumption that they were paid by Todd. But the presumption is the other way. It would be presumed that some legal owner paid such taxes.

"Every presumption is to be made in favor of the true owner." Angell on Lim., sec. 385.

"Mere possession would be presumed to be in subordination to the real title, as the law never presumes a wrong." *Id.*

"The law presumes the person having the legal right to be in possession and seisin until ousted by one having a claim of right." Angell on Lim., sec. 384, cites 6 Peters, 743; 5 Id., 354; 2 Wh., 29; 8 Cow., 589.

"Survey, allotment and conveyance of a piece of land and the recording of the deed, does not constitute disseisin, without an open occupation." Angell on Lim., sec. 390.

As to what constitutes adverse possession see further 26 Am. Dec., 102 n.

In *Ewing vs. Burnett*, 11 Peters, 42, upon the prayer of the defendant, the court charged the jury that payment of taxes and speaking publicly of the claim, was not sufficient evidence of claim of right, and this was sustained.

"Payment of taxes, though it may extend the limits of an adverse possession, does not constitute it. Like any other voluntary payment of another's debt it gives no right or advantage against the owner. There must be along with it an actual occupancy of at least a part of the land, and for half the period there was no such occupancy before us." *Sorber vs. Willing*, 10 Watts, 142.

In *Reed vs. Field*, 15 Vermont, 672, it was held that tax deed of fifty years and payment of taxes under color of a tax collector's deed, was not sufficient to show even color of title, without also proving the preliminary requisites of such deed.

See also *Naylor vs. Albright*, 4 Whart., Pa., 241; *Chapman vs. Templeton*, 53 Mo., 463; 4 Watts & Serg't, 36; *Jackson vs. Tendlow*, 3 John., 388; Angell on Lim., sec. 396.

One of the reasons given for the necessity of a notorious occupation is that the running of the Statute of Limitations is founded upon the theory of acquiescence; (Angell on Lim., sec. 392); and there could be no idea of acquiescence without knowledge by the legal owner. Of course mere payment of taxes, even if there were any evidence of such payment, could give no notice.

The principal defects of the tax sale and deed were that there was not legal notice, and it was not made legally a matter of record. Besides, no tax deed made out as this was gives any one any notice, the grantor being the mayor, &c., of Washington, and the name of Stephenson not appearing in the index; and no report, by the collector of taxes, of said sale was placed upon the land records of the county as required by law.

There was no actual notice of any claim of title by the complainant, or of any person whatever, as against the heirs of Stephenson; and, as we have seen, nothing equivalent to any notice of such claim. There was no record of a sale for taxes as required by law; the alleged tax deed, made fourteen years thereafter, was not recorded according to law, and certainly there was nothing to call attention to the decree of the Baltimore county court. The heirs of Stephenson having the legal title were, constructively, at least, in possession until ousted, and if any such ouster has taken place they never knew it.

The claim of adverse possession against these heirs is certainly unsustained by any presumption of payment of taxes, which is the sole ground of complainant's claim.

Mr. Justice WYLIE delivered the opinion of the court.

This is a bill to quiet the title to the west half of lot 3 square 780. The bill was filed the 19th of September, 1883. The plaintiff claimed under a tax title, and some mesne conveyances. The defendants claim under the real title. The property was vested in James S. Stevenson in his lifetime, and he died about the year 1811, seized. The defendants are all heirs at law of James S. Stevenson. It is claim, then, of the party who holds the tax title under the corporation of Washington against the heirs who hold the real title.

The tax title is briefly this: This piece of property was sold for \$1.42, in the year 1827, for taxes due for the years 1824, 1825 and 1826. No tax deed was ever made for the property to the purchaser for thirteen years, and then, in 1841, the tax deed was made in pursuance of the sale which took place in the year 1827, and no possession was taken by the purchaser, or by any person claiming title under this tax sale, until 1870. The tax title had passed by many conveyances through different hands, amongst others William B. Todd, well known in this District as a dealer in tax titles. In 1870 these plaintiffs took possession of the property.

The lot lay out in an unimproved part of the city, and although we have no evidence of the fact, it is very probable, from the lights we have, that the intermediate taxes, after the tax sale in 1827, had been paid by either the original purchaser at the tax sale, or by those who claim under the purchaser. There is no evidence that these heirs ever paid the taxes, which were very small. The bill does not aver that this was a valid tax sale, and there is no proof to establish its validity. But the theory of the bill is that, whether the tax sale was valid or not, the deed under it gave a colorable title. It was necessary, if the plaintiff relied upon the validity of the tax title, that he should show it. A tax deed of itself proves nothing. There are statutes in some States which declare that a deed given by an officer who is authorized to give a tax deed, gives a title *prima facie* good. But we have no such law. In this District, a man who claims under a tax title must show it to be good. Just as a man who claims under a deed from the marshal cannot make out any title on the face of the deed. The marshal's deed itself gives no title, because the marshal is acting under an authority, and his authority to make a deed must be shown, and to establish that authority it is necessary to give in evidence the judgment and the execution, and show the authority of the marshal to make the deed. So in regard to a public officer who sells property for the non-payment of taxes. His deed, on its face, amounts to nothing. His authority for making the deed must be shown; otherwise it is a void act.

As we have said, the bill does not aver a good tax title. It is merely claimed that it was a colorable title. But a colorable title is generally a void title in itself. A party who claims to enter under color of title, and by length of adverse possession gains a good title, will hold according to the metes and bounds set out in his colorable title, and that is the only effect of his color of title. The entry in the first instance may be that of a mere trespasser, without colorable title, but if he remains in adverse possession twenty years he gains a title—but his title is only for exactly the land that he

claims and stands upon—that he has actual possession of But if he had entered under a color of title, and his deed sets out by metes and bounds the property, then his possession of a part of the land would extend in contemplation of law to the whole, if he has possession long enough to give him title to the whole tract.

It is a very liberal concession to the complainant in this case to say that he has a colorable title. For if the face of the tax deed shows that it was absolutely void it does not even give color of title, and in this case there is strictly nothing to show that this tax deed amounts to anything at all. But assuming that the complainant has a color of title, as it is claimed, it is only colorable, for he has made out no title under the tax deed. The fact that he has a tax deed, that the tax deed was recorded and that he has paid the taxes on the property, is no proof of title at all as against the real owner. In this case there was no actual possession until the year 1870, and from that date we have thirteen years of adverse possession by the complainant. But thirteen years of adverse possession does not make a title. It requires twenty years of adverse possession to make a good title, and that possession must be open, notorious and actual, not constructive. Payment of taxes does not amount to adverse possession; nor does recording a deed amount to it, and for the reason that it is not visible, open and notorious, and more it is not actual. There is not an authority in the books which supports or gives countenance to the pretext that a man can be ousted of the title to his property by some other person paying his taxes, and by simply getting a tax deed for the land. The tax deed must either be valid or there must be actual, open, notorious, visible adverse possession against all the world for twenty years. It is not necessary that a mere fence should be about it, but there must be actual, open and notorious possession of the property.

We do not find the statute, which is in force here, in regard to adverse possession either in Thompson's Digest or in Kilty's Laws of Maryland. Our statute is the statute of

21 James, ch. 1, sec. 16. It is to be found in Alexander's British Statutes, but you will not find in Thompson's Digest or Kilty any statute on the subject of adverse possession. The statute of James declares that no man shall be deprived of his right to enter upon his land except by an adverse possession of twenty years. Some of the States have their own statutes upon the subject which prescribe twenty-one years, but we have no statute of our own except this English one, which has always been held to be in force here. In this case there has been an adverse holding for thirteen years only. So that there is no title by adverse possession.

To meet these difficulties, the complainant avers that he has a right to be considered in possession of the property, because the tax deed was recorded in 1841, and that gives him color of title, and that he has been paying taxes upon the property himself, and those under whom he claims have also paid taxes; but that cannot eke out adverse possession, because the payment of taxes and the recording of the deed are no part of adverse possession. The complainant, therefore, so far as this court can see, has no title upon this record, either under the tax sale or by means of adverse possession. That is enough to dispose of this case, but we wish to say something about these applications to quiet title, in regard to which courts have always been very exact.

Courts of equity will never interfere between two claimants to a piece of real estate, for the purpose of quieting title, unless the complainant shows a clear and indisputable title, but will leave him to any other remedy that he may have.

In *Alexander and others vs. Pendleton* 8th Cranch, 462, Chief Justice Marshall says that "the prayer of the bill ought not to be granted in a doubtful case" to quiet title. And in *Orton vs. Smith*, 18th Howard, 265, Mr. Justice Grier says: "Those only who have a clear, legal and equitable title to land, connected with possession, have any legal right to claim the interference of a court of equity to give them peace or dissipate a cloud upon the title."

It is a mere flight of imagination, upon the part of counsel for complainant in this case, it seems to us, to assume that there is shown in this case such a clear, legal and equitable title to the property in question, accompanied by possession, as to call for the intervention of this court. It is said that the court should interfere in a case of this kind, where the plaintiff has possession, for the reason that he cannot bring an action of ejectment. He cannot bring the case to issue, but must stay there in possession and wait an attack from the other party. In other words, being in possession, he must either stay until adverse possession completes his title, or he must be without a remedy.

Well, that is an appeal which might be made to the legislature, and we see, in looking through the cases, that in one of the States—the State of Ohio—they have a statute which meets the case. There any party in possession who wishes to clear his title may, without waiting for the completion of his title through adverse possession, file his bill against all persons whom he may name whom he charges with having adverse claims, and he can bring them into court for the purpose indicated, at any time. That probably is a very salutary statute; but we have no such law here.

Purchasers at tax sales have never been very much favored. Here the original sale was made in 1827 for taxes due in 1824, 1825 and 1826, and this property was sold for \$1.42. But the complainant says that he has paid a large sum of money for this property; and it is claimed that this gives him a strong equity. We do not think so; every man who buys under a tax title knows that he is buying something that he is obliged to defend.

Here the original sale was for a dollar and forty-two cents, and no deed was made in pursuance of this sale until 1841. Whether any changes in the tax office took place in the meantime, or whether the officer who made the sale in 1827 was the officer who made the deed, or whether the forms of law were complied with in regard to the sale, in any respect, we do not know, because upon none of these matters have we any evidence, and no court of equity is to presume very

strongly in favor of a tax title. A party who purchases from others who hold a tax title, purchases with full knowledge that he is running a risk, and he is bound to know whether the tax title is good or not. He buys with his eyes open. To no person does the rule *caveat emptor* apply more than to the purchaser of a tax title. The intermediate owners of this tax title died, and, among others, William B. Todd, and generally when a man dies seized of real estate, and leaves it to his heirs, it is some presumption in his favor. But there is no presumption at all in favor of the validity of a title which is descended from a deceased ancestor, unless that ancestor died seized. None of these intermediate tax owners of this property ever died seized of this lot.

We think on every ground that the bill ought to be dismissed. That was the decree below, and we affirm the decree.

AUGUST HERRING vs. THE DISTRICT OF COLUMBIA.

LAW No. 21,783.

{ Decided March 2, 1885.

{ The CHIEF JUSTICE and Justices MAC ARTHUR and JAMES SITTI NG.

1. A municipality is not liable for damage to private property, occasioned by the accumulation of water within a square left below grade in making a public improvement.
2. In the process of public improvements, a municipality so raised the grade of certain streets as to leave the enclosed square below the new grade thus established, and turned a natural stream into a sewer in such a way as to leave the old channel exposed within the limits of the square. The owner of property within the square did not conform his premises to the new grade: Held, That the municipality was not liable for damage to such property occasioned by the accumulation of water within the square, notwithstanding one of the streets crossed the old channel, and the raising the grade of that street destroyed a former culvert through which the stream had flowed.

STATEMENT OF THE CASE.

This action was instituted on April 2d, 1880, and was first tried at the October Term of the Circuit Court, resulting in a verdict and judgment in favor of the plaintiff. On appeal, that judgment was reversed by the court in General Term, and a new trial ordered. (See the report of the case, 2 Mackey, 87.) In the light of the opinion of the General Term, the declaration was amended by striking out so much thereof as counted upon alleged negligence in respect of a plan of sewerage adopted by the defendant in the premises. The case made under the amended declaration was as follows:

The plaintiff was the owner of a certain dwelling house and lots in square No. 616, in the city of Washington through which square there ran, diagonally, a natural stream of water, flowing, by means of a culvert, through and under North Capitol street, the eastern boundary of the square. In the course of certain public improvements the defendant caused the grade of O street, the southern boundary of the square, and on which the plaintiff's premises

ises faced, to be greatly raised; whereby the plaintiff's premises were thrown below grade, and the falling rain water was drained thereupon. In addition, the defendant built along First street, the western boundary of the square, and thence eastwardly along O street, a large sewer, entirely above the level of the plaintiff's premises.

At some distance to the north of square 616, the sewer thus built was so constructed as to take in the natural stream at that point, so that the whole of the stream, except so much thereof as might be said to be between the last-mentioned point and the southeastern corner of the square, was taken into and carried off by the sewer. And, finally, in pursuance of the general plan of improvement, the grade of North Capitol street was also raised, and the culvert through which the stream had formerly flowed under that street was destroyed, the street being built solidly up to the new grade.

Along so much of the bed of the former stream as had been left (that is to say, along that part lying between the point at which the stream entered the sewer and the site of the former culvert at the southeastern corner of square No. 616), were several springs, and the ground sloped towards the former channel of the stream, so that the falling rain water ran down into it. By these means, a large quantity of water had accumulated at North Capitol street, where the culvert formerly was, and, backing up in the old channel, overflowed the plaintiff's premises, and entered the lower floor of his house, to a considerable depth at times.

For the damage thus occasioned, the plaintiff brought suit. It appeared in evidence that before building his house, he had ascertained the future grade, and had so built that the lower story of his house would serve as a basement when the street should have been raised to such grade; but after the new grade was established, he did not raise any one of his lots to conform thereto.

Under instruction by the court, the jury found for the defendant.

BIRNEY & BIRNEY for plaintiff:

1. The defendant is liable, as having stopped a natural watercourse. After the building of the sewer and the raising of North Capitol street, the springs and the falling rain water continued to flow into the channel as before. This was a watercourse, according to all the authorities. Washb., Eas. & Serv. (2d ed.), 268, 272; 6 Wait's Ac. & Def., 258, and cases; Angell on Watercourses, 126-141, and cases.

2. The result of the defendant's action in the premises was a direct invasion of the plaintiff's property. This is a taking within the meaning of the Constitution for which the plaintiff is entitled to compensation. St. Peter vs. Denison, 58 N. Y., 423; Pumpelly vs. Green Bay Co., 13 Wall., 181.

FRANCIS MILLER and HENRY E. DAVIS for defendant:

The defendant is not liable, as the damage was caused by the prosecution of a public improvement, involving change of grade of public streets. There is nothing in the case to take it out of the well-known general rule. The defendant rightly assumed that the plaintiff, and all other lot owners in the square concerned, would conform their premises to the new grade. If this had been done, the channel of the former stream at that point would have disappeared, and the damage occasioned the plaintiff would have been impossible. A public improvement which involves the utter annihilation of a stream, does not stop the stream in the sense in which a city is liable for damming a watercourse so as to flood the land of the citizen.

Mr. Justice JAMES delivered the opinion of the court.

In this case the plaintiff claims that the District of Columbia, in constructing a street which crossed a ravine, blocked up and stopped a waterway, thereby causing the formation of an extensive pond, which overflowed his premises. In his declaration he states two causes: first, that

there was a natural stream fed by springs; and, secondly, that the same conduit at the bottom of the ravine was the waterway for the surface drainage. But he, finally, stood upon the latter ground, for the testimony showed that the spring stream had been diverted far above that by a sewer, and that, substantially, the water-course spoken of consisted of the intermittent flowing of the surface water after it had drained down off the surface of the adjoining land into this stream bed.

He cited cases to show that the arresting of the flow of the natural stream, in cases of that kind, made the municipality responsible. Then he proceeded to argue that if there was a stream, formed, it is true, by surface water, there was no distinction between the two; that it was the arresting not of surface water, but of a stream. And he cited a case (*Rose vs. St. Charles*, 49 Mo., 509) where the court had held a municipality responsible for arresting a stream which during part of the year did not flow. He also adduced a passage from Judge Dillon's work on *Municipal Corporations*, in which a doubt is expressed of the propriety of the ordinary rule when it was applied to the formation of a pond under these circumstances. But the author gives the cases in a foot note, remarking that the authorities thus far were rather the other way.

For the time that it flows this is a stream of water, but the whole circumstances are the result of the formation of a piece of land below grade, and although the flowage does thus accumulate at the bottom of a ravine, and does temporarily constitute a stream, we feel obliged to regard it as the method of action of surface water produced by the surface form of the land.

We do not, therefore, perceive any reason for holding the municipality for results which were caused primarily by the situation of the land below grade. It can hardly be said that the municipality has produced this injury, when an intervening fact occurs, namely, the situation of the land below the grade. If the owner of the land chooses to remain in that condition, he may lawfully do so, but he takes the

consequences of his situation. We think, therefore, that these circumstances would not impose any liability on the part of the city when it comes to exercise its lawful power of making streets on a certain grade.

For these reasons we affirm the judgment.

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ACTIONS, LIMITATION OF. See *Limitation of Actions*.

ACTION, RIGHT OF.

Where a public sewer is built, without right, upon land, the right of a subsequent purchaser to recover damages in respect to the existence of the sewer upon the land, is limited to such injuries as may have resulted therefrom since the date of the purchase. *Alexander v. The District*, 192.

ADMINISTRATORS. See *Executors and Administrators*.

ADVERSE POSSESSION. See *Color of Title*.

AGENCY. See *Principal and Agent*.

ALIMONY. See *Equity*, 3.

AMENDMENT. See *Appeal*, 2; *Decree*, 1; *Pleading and Practice*.

1. A decree may be amended so as to allow costs to the party entitled. *Waller v. Ward*, 65.
2. A decree may be amended or corrected on motion where the amendment or correction desired is merely to conform the decree to the decision of the court, as where there has been a mistake in computation, or a mistake of the clerk in entering the decree or the like; but where the decree is attacked in its terms and substance or where any of its material provisions are sought to be varied, a rehearing of the case is the proper practice, and though this court has countenanced the practice of altering a decree even in its material provisions, upon motion, it is in substance really a motion for a rehearing. *Vincent v. Vincent*, 320.

APPEAL. See *Pleading and Practice*, 13.

1. In an ordinary case of a decree against two joint defendants, one of them cannot separately appeal; but where the real contesting parties are the plaintiff and one of the defendants only, the other having no interest in the suit, a decree in favor of the plaintiff is virtually a decree against such defendant only, and he may appeal therefrom notwithstanding no appeal is taken by the other defendant. *Raub v. Relief Association*, 68.
2. A party who moves the court by petition to alter one of the provisions of the decree cannot appeal from the decree until his motion is disposed of; such an appeal will be dismissed on motion. *Vincent v. Vincent*, 320.

ARREST OF JUDGMENT. See *Pleading and Practice*, 13.

ASSESSMENT, SPECIAL TAX. See *Special Assessment Tax*.

ASSETS, MARSHALLING OF.

The rule in regard to marshalling of assets does not apply to a case where a creditor, having originally, equally with all the other creditors, the right to proceed against the real as well as the personal estate of the debtor, loses by *laches* the right of recourse against the realty. *Groot v. Hitz*, 247.

ASSIGNMENT.

1. Where an assignment is made by a debtor to a third person as trustee for the benefit of the assignor's creditors, the assent of the creditors provided for to the assignment will be presumed. *Webster v. Harkness*, 220.
2. In such case the money is no longer under the control of the debtor, and consequently is not liable to attachment. *Id.*

ATTACHMENT. See *Assignment*.

AUDITOR.

Where the auditor files with his report alternative statements of an account, he should state which of them he considers the correct one and adopting that leave the parties to file their exceptions. *Groot v. Hitz*, 247.

AUTREFOIS ACQUIT.

1. The courts of the United States are invested with power to determine conclusively in the trial of a criminal cause when the interests of public justice require that the jury shall be discharged, and such a discharge is not in any sense equivalent to a verdict of acquittal, or a defence against a further trial upon the same or a new indictment. *The United States v. Bigelow*, 393.
2. But this discretionary power to discharge the jury during the course of a criminal trial is not to be understood as containing the slightest element of arbitrary choice. The discretion is one which the trial justice must use under a solemn obligation to satisfy his judgment that such a course is required by the interests of justice. *Id.*
3. Fourteen indictments were found against the defendant for embezzlement, to each of which he pleaded not guilty. Afterwards, at his instance, they were all consolidated and directed to be tried as one case. A jury was then empanelled and sworn, and the district attorney opened the case to the jury, stating what he expected to prove in relation to each and all of the indictments. After he had closed, and before any evidence was taken, the presiding justice, on his own motion and against the protest of the defendant, rescinded the order consolidating the indictments, discharged the jury and directed the district attorney to select one of the indictments for trial, which was done, and the same

AUTREFOIS ACQUIT (*continued*).

jury resworn. Whereupon the defendant pleaded *autrefois acquit* which was overruled on demurrer and the trial proceeded with, and a verdict of guilty found. On appeal to the General Term it was held that this discharge of the jury was not equivalent to an acquittal, and was no defence to the second trial. *Id.*

AWARD. See *Referee*.

BALTIMORE & POTOMAC RAILROAD CO., CHARTER OF.

The charter of the Baltimore & Potomac Railroad Company (act of Congress of February 5, 1867) authorizes it to take and use for depot purposes, with the turnouts necessary to reach it, any lots of ground in the city of Washington contiguous to the line of its road; that is to say, any lots between the front of which and the line of the road no other lots intervene, and for this purpose square 232 is contiguous to the line of the road although, by the recess caused by the intersection of several streets, it does not touch Maryland avenue along which the road runs. *Railroad Company v. The Commissioners*, 526.

■ BANKRUPTCY.

Although the creditor's name be innocently or accidentally (but not fraudulently) omitted from the schedule of creditors provided for by the Bankrupt act of March 2, 1867, the discharge and certificate is conclusive evidence in favor of the bankrupt, and a complete bar to a suit against him by the omitted creditor. *Hoffman v. Haight*, 21.

■ BILLS AND NOTES.

1. A note, consecutively endorsed by three persons, being dishonored, the holder notified by mail the last endorser, who lived in a different city, enclosing him at the same time two notices for delivery to the other endorsers, the last of whom resided in the same city with the holder of the note. These notices the endorser to whom they had been mailed immediately delivered to his next endorser, who, in turn, mailed, on the next day, to the first endorser, the notice intended for him.

Held, Sufficient to fix the liability of the first endorser. *Edmonston v. Gilbert*, 351.

2. The rule laid down in *Morton vs. Cammack, Mac A & Mackey*, 22, that where the holder and endorser reside in the same city, notice of protest by mail is not sufficient, does not apply to a case where there are several endorsers some of whom live in another city. *Id.*

BILLS OF EXCEPTIONS. See *Pleading and Practice*, 11.

1. An exception contained the charge of the court and stated "and to so much of the said instructions granted by the court, on its own motion, as are contained in brackets," plaintiff excepts, &c.

BILLS OF EXCEPTIONS (*continued*).

Upwards of two pages of the charge were thus contained in "brackets ;"

Held, that the exception being a wholesale one—pointing out no particular remark in the charge as incorrect—did not properly present to this court any question which it was called upon to examine. *Langdon v. Evans*, 1.

2. Where a bill of exceptions contains all the evidence offered in the court below, this court may treat it as a case stated. *Maulsby v. Barker*, 165.

BILLS OF PARTICULARS. See *Pleading and Practice*, 8, 9.

BOARD OF HEALTH.

1. The joint resolution of Congress of April 24, 1880, adopting and legalizing certain ordinances of the Board of Health of the District of Columbia rendered those ordinances the laws of the District; and the Police Court of the District of Columbia has jurisdiction to impose and enforce the penalties set forth therein. *The District v. The Gas Light Co.*, 343.
2. The District of Columbia *vs.* Bates, 1 Mac A., 493, so far as it refers to the powers of Congress and of the Board of Health in respect of nuisances, questioned. *Id.*

BOARD OF PUBLIC WORKS. See *Special Assessments*.

It was entirely within the discretion of the Board of Public Works to determine upon the width of pavements to be laid under the acts authorizing special improvements and assessments therefor. *Johnston v. The District*, 97.

BONA FIDE PURCHASER.

By an ordinance of the common council of Washington a special tax was laid to defray the costs of certain street improvements. The tax was imposed and levied on all lots and parts of lots bordering on the line of the improvement. By the provisions of the ordinance the manner of assessment was to be as follows: The assessors were to sum up the aggregate cost of the work, and to state the amount due from each lot. This assessment roll was then to be deposited with the register, who was to place it in the hands of the collector, whose duty it then became to place it upon record in the tax ledger kept in his office, and notify the parties of the amount due from each, within thirty days after receiving the assessment roll. Certain lots bordering upon the line of the improvements were omitted from the assessment roll at the time of making the assessment and of depositing the roll with the register, which was in November, 1870. In October, 1871, the owner of the omitted lots conveyed them to K., a *bona fide* purchaser, who purchased without knowledge of any lien and after searching the assessment rolls and finding no assessment against the lots. One month after his purchase they were entered on the assess-

BONA FIDE PURCHASER (*continued*).

ment rolls by a memorandum in red ink stating that they had up to this time been omitted. After this entry was made K. conveyed to L. who conveyed to S., and he to the plaintiff, who took and recorded his title some time in April, 1881, long after the entry in red ink had been made.

Held, That K., having exercised all the diligence required of a *bona fide* purchaser in searching the assessment rolls at the time of his purchase, took the property free and clear of the tax, and that his grantees took the same title although purchasing with knowledge of the later entry. *Alley v. Lyon*, 457.

BOUNDARIES.

1. Where a house is sold "with the lot attached," the question as to the extent and boundaries of the latter is one of fact for the jury. *May v. Smith*, 55.
2. The rule on the subject of boundaries is, that if a deed calls for a line to run to a fixed boundary or a fixed line, the description of the distance, inconsistent with that call, must yield to the call. *Mackall v. Richards*, 271.

BUILDING ASSOCIATIONS. See *Equity*, 3.

1. A payment by a stockholder of a building association of his dues to one of its officers not having authority to receive them, does not discharge the stockholder if the officer so receiving the money fails to pay it over; nor can the association charge the loss against its assets in its account with the stockholders so as to diminish the value of their shares. *Morrow v. James*, 27.
2. The terms of a building association contract with its borrower or advancee, discussed and held not to be usurious. *Burns v. Building Association*, 333.

BY-LAWS. See *Insurance*, 1.

Where an association is chartered by an act of Congress, any by-law of such association, contrary to the provisions of the charter, is in effect a by-law in violation of a statute of the United States, and will, if for no other reason, be void. *Raub v. Relief Association*, 68.

CASE STATED. See *Exceptions, Bills of*, 2.**CERTIORARI.** See *Pleading and Practice*, 16.**CHALLENGE OF JURORS.**

In the District of Columbia, on the trial of any felony other than treason or a capital offence, the defence is entitled to ten peremptory challenges and the Government to three. *United States v. Dunn*, 151.

COLOR OF TITLE.

1. Where one enters claiming under color of title, and by length of adverse possession, gains a good title, he will hold according to

COLOR OF TITLE (*continued*).

the metes and bounds set out in his colorable title, although his actual possession has extended only to a part of the land claimed, and that is the only effect of color of title. *Keeffe v. Bramhall*, 551.

2. But, where the entry in the first instance is that of a mere trespasser, without colorable title, his adverse possession of twenty years gives him title only to the land he has actual possession of. *Id.*

CONGRESS.

Congress has power to adopt a law by reference to it, without embodying the law referred to in the act adopting it, provided the reference be clear, distinct and unmistakable. *The District v. The Gaslight Co.*, 343.

CONSTABLES, BONDS OF.

The bonds of constables given under and in pursuance of the act of Congress of June 7, 1878, are not affected or controlled by the act of March 3, 1863, requiring the renewal of constables' bonds every two years. The bond given under the act of 1878 runs during the term of the constable, to wit, four years, while under the act of 1863, the bond ran indefinitely until renewed, or until the officer was removed. *The District v. Van Horn*, 388.

CONSTITUTIONAL LAW. See *Police Court, Jurisdiction of*, 2.

A government official cannot call in question the constitutionality of a law directing him to perform a purely ministerial duty. *U. S., ex rel. Schumacher, v. Marble*, 32.

CONTRACT.

1. Where one has placed himself in a position which will disable him from performing his part of a contract, he cannot sue the other party to the contract for a failure to perform his part of it. *Simmons v. Pomeroy*, 213.
2. P. agreed to convey certain lands to L. in exchange for a certain house. Afterwards L., for a consideration paid him by S., assigned the contract to S. and conveyed him the house, the latter assuming to convey the same to P. on receiving from him the title to the lands; S., however, finding the title to the house bad, returned it to L.; P. then refused to convey the lands, and upon suit brought by S. against him for breach of contract, it was—

Held, That S. was bound to be ready to convey the house as soon as P. tendered him the land, but that as he had put it out of his power to convey the house by returning it to L., he had already broken his part of the agreement, and was not in a condition to sue for the breach on the part of P. *Id.*

3. A contract may be illegal and void in part as against public policy, and yet good as to the residue. *Sunderland v. Kilbourn*, 506.
4. K. & L., a firm of real estate agents, were employed by S. and H. to make purchases of real estate. Under the contract, if the prop-

CONTRACT (*continued*).

erty was accepted at the price submitted, K. & L. were to be paid a commission on the purchase price. At the time of, and some time before, entering into the contract, K. & L. held the refusal of a piece of property at \$40,000. After the contract was entered into, K. & L. took the money deposited with them by S. and H., and purchased it for themselves, and then, without making known to S. and H. that they were really the owners of the property, submitted it to them at \$65,000. The latter accepted it at that price, and the conveyance was accordingly made. S. and H. subsequently discovered the real facts, and claimed the benefit of the purchase at \$40,000. But it was *held* that K. & L. were under no obligations to give S. and H. the benefit of a contract of refusal entered into before their contract with them. That the remedy of the latter was to repudiate their contract if imposition had been practiced by a concealment of facts; but they could not retain the property and recover the \$25,000 in addition.

5. And where, in another transaction under the contract, a return of part of the purchase money was claimed on the ground that K. & L. had defrauded the vendors of it, it was *held* that even if the vendors had been defrauded as alleged, this fact did not entitle S. and H. to receive the benefit of it.
6. But where K. and L., acting under the contract, purchased a piece of property at 40 cents a foot and turned it over to S. and H. at 50 cents. at which price the latter agreed to take it, it was *held* that K. & L. were accountable to them for the difference. *Id.*

COSTS. See *Decree*, 1.

CRIMINAL LAW. See *Autrefois Acquit*; *Cumulative Sentence*.

CUMULATIVE SENTENCES.

1. If distinct offences, although of a similar character, are set forth in several counts in the same indictment, and *a fortiori* if set forth in different indictments or informations, it is in the power of the court to impose cumulative sentences—that is, periods of confinement, each one of which is independent of the other. *In re George Fry*, 135.
2. The prisoner was sentenced upon six separate informations, each one of which set forth the offence of receiving stolen goods. On *habeas corpus*, the petition did not aver more than that the record would show on inspection that there was only one crime committed. It was—
Held. That the record did not show anything of that sort, and that the court had no right to assume that the goods set forth in the several informations were feloniously received at one time as stolen goods. *Id.*
3. A cumulative sentence of imprisonment is sufficiently certain where

CUMULATIVE SENTENCES (*continued*).

the imprisonment is made to commence at the expiration of an imprisonment under a previous sentence, the number and date of which is given. *Id.*

DECREE. See *Amendment* ; *Appeal*.

DEED, CONDITION IN.

1. A condition introduced in a deed signed only by the grantor that the grantee shall assume the payment of a certain promissory note, secured by a prior deed upon the property conveyed, is not binding upon the grantee unless the conveyance and its conditions are brought to his knowledge and he accepts the property thereunder. *Keller v. Ashford*, 445.
2. Payment of interest on the note and the collection of the rents are not inconsistent with the theory that the grantee took the property under the supposition that it had been transferred to him merely as security for an indebtedness due him, especially when there is no evidence that he had any knowledge of the deed and its conditions. *Id.*

DEMURRER. See *Pleading and Practice*, 3, 4, 5.

DISMISSAL OF SUIT, EFFECT OF. See *Equity*.

DISTRICT OF COLUMBIA. See *Municipal Corporations*, 1, 2, 3, 5, 6.

DUE PROCESS OF LAW. See *Insane Persons*.

EASEMENTS.

1. One cannot have a right of way over his own land as something separate from the fee simple ownership; all such rights are considered merged in the ownership of the soil. Consequently where the owner of a lot which extended from the street in front to an alley in the rear, sells, "with the appurtenances thereto belonging," a portion of the lot, which portion fronts upon the street but does not quite extend to the alley, the term "appurtenances" does not carry with it a right of way to the alley over the part not sold. Such a right can only be conveyed by express grant. *May v. Smith*, 55.
2. The owner of an easement in land can abandon or extinguish it if he chooses, and if he does so, and afterwards sells the land, the easement is no longer incident to it. *Id.*

ENCUMBRANCES, PRIORITY OF.

Where different parcels of land, all subject to a common encumbrance, are conveyed to successive purchasers at different dates, the proceeds of the land must be applied in the inverse order of alienation to satisfy the first encumbrance; thus, L., being the owner of a lot of ground, gave a first deed of trust on the whole of it to Y. He then gave a second trust on a part of it to Q.

ENCUMBRANCES, PRIORITY OF (*continued*).

Still later he conveyed the whole lot, except the part covered by Q.'s deed, to W.

Held, That the part conveyed to W. ought to be applied to satisfying the first encumbrance covering the whole property before disturbing the part covered by Q.'s trust. *Looney v. Quill*, 51.

ENDORSEMENT. See *Promissory Notes*.**EQUITY.**

1. At a sale of real estate made by trustees in foreclosure of a trust given to secure the payment of a debt, the party bidding did not know the metes and bounds of the property sold ; but it was *held*, that he was bound by his bid and could not refuse to accept the property ; and therefore if less was conveyed to him than was sold, he was entitled to a conveyance of the remainder, even though he had been conveyed all that he supposed he was bidding for and that this latter conveyance may be by a second deed conveying only the part not conveyed by the first. *O'Day v. Vansant*, 196.
2. A judgment creditor filed a creditor's bill for the purpose of subjecting the equitable interest of the debtor in certain real estate to the satisfaction of the judgment. A decree was made, and the interests ordered to be sold. After this the judgment creditor assigned the judgment, and shortly afterwards the assignee, instead of enforcing the sale, entered an order dismissing the suit. *Held*, That by dismissing the suit, the property was discharged from the lien created by the decree, and that the lien of the judgment was also discharged from such other property of the defendant as had been conveyed away by him. *Shepherd v. Brown*, 266.
3. The scrutiny with which courts of equity regard a deed between parties holding a confidential relationship to each other, proceeds upon the principle that before and at the time of the conveyance, the grantor holds such a relation to the grantees as to place him in contemplation of law mentally under his domination and control ; and it is important in making out this confidential relation, that it should be shown to have preceded the whole transaction. Proof that it was contemporaneous with and grew out of the transaction itself is not sufficient. *Henson v. Hill*, 315.
4. Plaintiff filed his bill for divorce and alimony, setting forth that the defendant was the owner of a certain lot in Washington, and alleging that it was all the property he owned except a small amount of house furniture and praying that this real estate be subjected to her claim for alimony. Before the filing of the bill the defendant owned two shares of stock in a building association, upon which the association loaned him \$215, taking therefor a bond which stated the amount loaned to be \$1,000. This bond was secured by a deed of trust upon the real estate in question.

EQUITY (*continued*).

After the filing of the bill the defendant repaid this \$215, but subsequently purchased other shares upon which the association made a further loan or advance, under the supposition that the bond and deed of trust first given secured future advances, and that this last loan would be covered by them. Subsequently to this the court passed a decree granting \$25 a month alimony.

Held, 1st, That the recital in the bond that the loan was for \$1,000 was not binding, and that the court could look into the real fact of the case to ascertain what amount was really loaned; 2. That the bond had no reference on its face to any future transaction; 3. That the second loan was entirely independent of the first; 4. That the plaintiff's suit was a *lis pendens*, and charged all persons with notice that the plaintiff was seeking to subject the property described to a decree for alimony; that the defendant having paid the first loan of \$214, discharged the property from the lien of the trust, and that the subsequent loan having been made *pendente lite*, was postponed to the lien of the plaintiff for her alimony. But as between the association and the defendant the bond and deed of trust were security for the subsequent loan. *Ulrich v. Ulrich*, 290.

5. Cases of fraud, trust and account are within the jurisdiction of courts of equity. Section 723 of the Revised Statutes, which declares that the courts of the United States shall not exercise jurisdiction where a remedy exists at law, only emphasizes a doctrine which existed before the passage of the statute. *Sunderland v. Kilbourn*, 506.
6. Equity will never interfere between two claimants to a piece of real estate, for the purpose of quieting title, unless the complainant shows a clear and indisputable title, but will leave him to any other remedy that he may have. *Keefe v. Bramhall*, 551.

ESTOPPEL. See *Evidence*, 2, 3, 9, 10; *Sales*, 1.

EVIDENCE. See *Bankruptcy*, 1; *Executors and Administrators*, 2, 3; *Malicious Prosecution*; *Witnesses*, 1, 2.

1. A written contract which is free from ambiguity cannot be explained or varied by parol evidence. *Langdon v. Evans*, 1.
2. The rulings of the court below as to the order in which evidence shall be offered during the trial, are within the discretion of the presiding judge, and are not the subject of appeal. *Id.*
3. An estoppel need not be specially pleaded; it may be offered under the general issue. *Id.*
4. But where the record of a judgment is offered in evidence in estoppel, and the identity of the parties, of the subject-matter, and of the pleadings, is not shown on the face of the record, it must be established by extrinsic proof before the record is admissible. *Id.*

EVIDENCE (*continued*).

5. And where such intrinsic evidence is offered, it is competent for the other side to adduce evidence in reply. *Id.*
6. But where the plea is the general issue, the plaintiff cannot, in his case in chief, offer evidence in estoppel in anticipation of a supposed defence of the defendant, since, *non constat*, that the defendant may make such defence. *Id.*
7. Where parties agree verbally that the terms of a verbal agreement which they have entered into is to be found as stated in a certain paper, that paper is the proper evidence of the particular matters to which they have agreed; not that the paper is the contract between them, but that it is the best statement of what they have agreed to verbally, and it should, if the contract be a proper one to be enforced, be submitted and read to the jury as the best evidence of what the contract was. *Williamson v. Hill*, 100.
8. Nor is it proper, with the paper thus assented to as the correct statement of the contract, that witnesses should be allowed to state from memory what the contract was, even though in doing so they are allowed to look at the paper to refresh their recollection, for the parties have agreed that the facts and terms of the agreement are to be found in the paper, and that it was to be resorted to as the evidence of their agreement. *Id.*
9. The erroneous exclusion of evidence is not a good ground for a new trial if the exclusion did not injuriously affect the case of the party excepting. *Id.*
10. In an action to recover rent of a wharf, plaintiff, the District of Columbia, offered, without objection or subsequent contradiction on the part of the defendants, evidence showing that defendants had admitted holding the premises in question under a lease from the District, and had paid the District rent therefor under said lease.
Held, That the court was warranted in assuming that the defendants held the property under this lease. *The District v. Johnson*, 120.
11. Where a party enters into possession under a lease, he is estopped from questioning the right of his lessor. *Id.*
12. It is error to leave to the jury the question whether anything of value was given to or conferred upon defendants by plaintiffs for which suit is brought, as that leaves to the jury a payment of question of law, *i. e.*, value in its legal sense. *Id.*
13. Admissions drawn from the plaintiff when on the witness stand in his own behalf, if they go to the foundation of his case, are pertinent to the issue, no matter what the form of the pleadings may be. *Tyler v. Gilmore*, 189.
14. In the correction and revision of erroneous special assessments for street improvements, the District Commissioners had adopted a general rule whereby a certain class, known as "Henry Cooke" assessments were uniformly reduced two-thirds of the original

EVIDENCE (*continued*).

sum. F., who was the attorney of C. in the prosecution of claims for the reduction of over-assessments upon C.'s property, included in his bill for services a charge of ten per cent. upon the amount saved to C. by the reduction of these "Henry Cooke" assessments.

Held, That unless there was some proof of services rendered by F. in effecting this reduction, he would not be entitled to recover this item of his bill, *Fague v. Corcoran*, 199.

15. Nor can recovery be had on a like charge for reductions claimed to have been effected on certain assessments, where an act of Congress is required before any credits for such reduction can be realized, and no such act has been passed. *Id.*
16. Where, also, certain assessments had been cancelled by a general order of the Commissioners, compensation cannot be had on account of the cancellation without showing that the plaintiff's services were directed to securing it. *Id.*
17. There is no presumption in favor of the validity of a title descended from a deceased ancestor unless the latter died seized of the property. *Keefe v. Bramhall*, 551.

EXCEPTIONS, BILL OF. See *Bill of Exceptions*.

EXECUTION. See *Landlord and Tenant*, 1; *Pleading and Practice*, 13.

EXECUTION SALE.

1. An execution sale will be set aside where the description of the property, both in the advertisement and in the marshal's deed, is so vague and uncertain that it is impossible to ascertain what property was sold and conveyed. *Mackall v. Richards*, 271.
2. It *seems* that where the description in the marshal's deed is a departure from the description in the advertisement of sale, the deed is void. *Id.*

EXECUTORS AND ADMINISTRATORS.

1. If an administrator pays a claim of a creditor of his decedent's estate, and returns it in his account, the Orphans' Court may allow it or reject it; but if the administrator refuses to pay such a claim, the Orphans' Court has no authority to adjudicate it; the creditor must seek its enforcement against the administrator in another tribunal. *Keyser v. Breübarth*, 19.
2. A judgment recovered against the administrator is not even *prima facie* evidence against the heir at law; the plaintiff must commence *de novo* against him upon his or her original cause of action, as if no suit had been instituted against the administrator, and the heirs at law are at liberty to make any defence that any one else could make to such new suit, including the defence of limitations. *Groot v. Hütz*, 247.
3. An executor, being a party to a suit, is an incompetent witness to invalidate a contract made by him personally with his decedent,

EXECUTORS AND ADMINISTRATORS (*continued*). -

- and which is the subject of the suit. *Rider v. White*, 305.
4. In a proceeding in equity an administrator, where acting in behalf of the creditors, may attack a transaction of his decedent as fraudulent. *Bank v. Hume*, 360.
 5. Where a sale of realty is directed to be made after the death of tenant for life, who is one of two executors, and there is no specific mention as to by whom the sale is to be made, there is no power of sale in the surviving executor; but the court will, on application of the parties interested, appoint a trustee to sell. *Hamilton v. Clark*, 428.

FRAUD.

1. B, being in apparently independent circumstances, settled upon his wife certain property to be held as her separate estate; soon afterwards, he became largely indebted.
Held, That, in the absence of explanation as to the cause of this indebtedness, the natural and inevitable inference must be that the indebtedness existed contemporaneously with if not anterior to the settlement. *Shepherd v. Brown*, 266.
2. Where the wife pays her husband's judgment creditor, and has the judgment marked to her use, the court will, on proper application, direct it to be entered satisfied, when it appears that the money paid by the wife to the judgment creditor was the money of the husband. *Id.*
3. S., a married woman, conveyed to C., in satisfaction of an indebtedness, a piece of property which largely exceeded in value that indebtedness. S. was, at the time of the conveyance, indebted to another for a loan of money which she had equitably charged upon the property. C. knew, at the time of the conveyance, of the existence of this debt, but it was not shown that she knew of its having been made an equitable charge upon the property. *Held*, That so much of the property conveyed which exceeded in value the indebtedness satisfied thereby, should be subjected to the satisfaction of this equitable charge, and that whether C. knew of the existence of the charge or not was immaterial. *Stewart v. Smith*, 281.
4. In a conveyance between parties holding a confidential relation to each other, the grantee, although not guilty of actual fraud, can take nothing from the deed which it would be inequitable for him, under the circumstances, and in view of that relation, to retain. On the other hand whatever he should equitably retain the court will not disturb. Such a case being distinguishable from one where the deed must be set aside entirely on the ground of fraud. *Mackall v. Mackall*, 286.
5. A court of equity will not allow a debtor, who has conveyed his property with intent to defraud his creditors, to impugn his deed,

FRAUD (*continued*).

or aid him to extricate himself from the embarrassment created by his own wrong. *Rider v. White*, 305.

FRAUDS, STATUTE OF.

Where a promise to pay the debt of another has for its object the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute. But a promise is not within the statute where the promisor undertakes to pay a debt which is at the same time owing by another, in order to obtain a benefit which he, the promisor, did not before enjoy, and which is to accrue directly to himself. Such a promise is not to pay another person's debt, but to pay what the promisor adopts as his own debt. It is the price which he undertakes to pay for a benefit which he seeks. Nor does it matter that the object sought in making the promise does not turn out to be a benefit to the promisor, it is sufficient that the promisee submits to a sacrifice in behalf of the interest of the promisor, and not for the benefit of the original debtor. *Williamson v. Hill*, 100.

GOVERNMENT HOSPITAL FOR THE INSANE. See *Insane Persons*, 2.

GUARDIANS. See *Actions, Limitation of*, 2.

INSANE PERSONS.

1. A person cannot be secluded *in invita* as an insane person until by due process of law he has been found to be insane. "Due process of law" in this case means the finding of the fact of insanity by a jury of inquiry. *In re Bryant*, 489.
2. There is nothing in the Revised Statutes of the United States regulating the Government Hospital for the Insane which contemplates compulsory seclusion without due process of law. The statute only opens the doors of that institution to those who have been judicially found to be insane. *Id.*
3. The act of Maryland of 1785, chap. 27, sec. 6, is in force in this District and regulates the control of insane persons. *Id.*

INSTRUCTIONS TO THE JURY. See *Pleading and Practice*, 10, 11.

INSURANCE.

1. By its charter the object of an association in the nature of an insurance company was declared to be "to provide and maintain a fund for the benefit of the widow, orphans, heir, assignee or legatee of a deceased member." One of the by-laws provided that "no change of beneficiary can be made or recognized until submitted to and approved by the board of directors." A member, being in good standing in the association, had named his sister as his beneficiary, with the consent and approval of the board of directors. Afterwards, he made a will, directing the fund derived from his interest as a member of the association, to be paid at

INSURANCE (*continued*).

his death to his illegitimate son. The association had no knowledge of this change, and on the death of the member, the sister claimed the fund.

Held, That the son was entitled to the fund, for the reason that the charter recognized the right of the member to designate the beneficiary by his will; and so far as any by-law attempted to cut off or diminish the right, it was inoperative. *Raub v. Relief Association*, 68.

2. The claims of creditors upon the proceeds of a life insurance policy, taken out by an insolvent debtor for the benefit of his wife and children, extend only to the premiums paid by him since the date of his insolvency; after this deduction the beneficiaries are entitled to the remainder. *Bank v. Hume*, 360.

INTEREST. See *Judgments, Interest on*.

JUDGMENTS. See *Equity*, 2; *Executors and Administrators*, 2.

JUDGMENTS, INTEREST ON.

1. H. recovered \$843.36 damages of a railroad company for obstructing the highway, and the General Term, affirming the court below, entered judgment for that amount. March 4, 1876. H., not satisfied with the amount of the judgment, appealed to the Supreme Court of the United States, where the judgment was affirmed. H. filed the mandate in the General Term, June 26th, and the court that day entered judgment for \$843.36, with interest from March 4, 1876. September 3d, following, the defendant company filed a bill in equity alleging improper representations in procuring the judgment on the mandate, also that the mandate contained no order to allow interest, and praying that H. be required to accept the principal sum only in satisfaction of the judgment. The defendant on oath denied improper representations. Upon hearing on bill and answer the court below dismissed the bill.

Held, That as there was no proof that the entry of the judgment was irregular the bill was properly dismissed. *Railroad Company v. Hetzel*, 495.

2. *Baptist Church vs. Railroad Company*, 2 Mackey, 458, commented upon as to whether judgments in tort carry interest in this District. *Id.*

JUDGMENTS, LIFE OF. See *Pleading and Practice*, 6.

JURISDICTION. See *Supreme Court of the District of Columbia*.

JURORS, CHALLENGE OF. See *Challenge of Jurors*.

JURY, DISCHARGE OF. See *Autrefois Acquit*.

LABELS AND TRADE-MARKS.

1. Whether the act of Congress of June 18, 1874, providing for the

LABELS AND TRADE-MARKS (*continued*).

registration of labels, is unconstitutional, and, therefore, void, *quære*. *U. S., ex rel. Schumacher, v. Marble*, 32.

2. The duty of the Commissioner of Patents, on the application to him to register a label, is a purely ministerial one, as much so as the act of a recorder of deeds in placing upon a public record a muniment of title. The statute has not defined what shall be considered a label—whether it shall be descriptive of the article to which it is affixed, or whether it may be a mere arbitrary design. If the applicant presents it as a label, and appeals to the Commissioner to give it the protection which the law provides for it as a label, the duty of the Commissioner is to register it, and in doing so he gives it only the protection which the statute provides. It is not protected as a trade-mark nor as a copyright. The public at large may use and enjoy it, but *qua* label it is restricted to the use of the party who has registered it for that purpose and no other. With the character of the device the Commissioner is not at all concerned. His function is as purely ministerial as it is capable of being. *Id.*

LACHES. See *Assets, Marshalling of*.

A claim which has been suffered to sleep for nearly twenty years with no effort to enforce it, will not be sustained by a court of equity when, in addition to suspicious circumstances surrounding it, there is no evidence going to satisfactorily explain the delay. *Rider v. White*, 305.

LANDLORD AND TENANT.

Under the Statute of 8 Anne, ch. 45, as modified by the landlord and tenant act (R. S. D. C., sec. 678), where execution is levied on goods situated on premises of which the execution debtor is tenant, the landlord has a prior lien for the rent in arrear, and, if the levy is made *after* a periodical instalment of rent has begun to accrue, for the whole of that period also, but no more, although the marshal, instead of taking the goods to the pound, kept them upon the premises for a longer period. *Harris v. Dammann*, 91.

LIMITATION OF ACTIONS. See *Executors and Administrators*, 2.

1. Limitations may be pleaded to a parol contract to pay rent, when the contract consists of an ordinance of a municipal corporation for leasing, assented to by the proposed lessee. *The District v. Johnson*, 120.
2. A suit brought by a ward on a guardian's bond is barred by limitations if not commenced within six years after the coming of age of the ward. (Acts of Md., 1729 and 1798.) *Groot v. Hütz*, 247.
3. The Statute of Limitations, in force in this District, in respect of real property is that of 21 James, chap. 1, sec. 16, and under it there must be twenty years actual, open, notorious, visible adverse possession against all the world. *Keefe v. Bramhall*, 551.

LIENS. See *Equity*, 2.

LIS PENDENS. See *Equity*, 3.

MALICIOUS PROSECUTION.

In an action for malicious prosecution, it is error to leave to the jury the determination of the question whether the defendant had probable cause for the prosecution complained of. It is the duty of the court to instruct the jury what facts, if proven, would constitute such probable cause; and it is the province of the jury to determine whether such facts are established by the testimony. *Tolman v. Phelps*, 154.

MANDAMUS. See *Patent Law*, 1, 2, 3.

1. On a petition for mandamus against the Commissioners of the District, this court can only direct the Commissioners to go on and execute their office, when it appears on the petition that they have refused to do so. But where it becomes their duty to examine alleged errors in an assessment it is immaterial whether, in that examination, they decide well or ill if it appears that they have examined and determined; the writ of mandamus cannot do the work of a writ of error. *U. S., ex rel. Henderson v. Edmonds*, 142.
2. Though the court might decline to interfere by mandamus, it may, nevertheless, with a clear opinion on the subject, inform the Commissioners of their duty in the premises. *Id.*

MARRIED WOMEN.

1. A contract by a married woman for the loan of money to carry on the business of a boarding house in which she is engaged, is not a contract relating to her sole and separate property; but if she has equitably charged her separate estate with the payment of the debt, the creditor's remedy is in equity. *Stewart v. Smith*, 281.
2. Under the Married Woman's Act in force in the District, whatever the character of the separate estate of a married woman, whether legal or equitable, she may make a contract having relation to it. *Id.*
3. Where a married woman resides in Virginia and owns property to which, under the laws of that State, her right is sole and separate, she has, when she comes into this jurisdiction, the same capacity, although a non-resident, to sue in respect of such sole and separate right that a married woman in this District has. *Id.*

MARINE CORPS.

1. Sections 1418 and 1419 of the Revised Statutes of the United States do not apply to enlistments in the marine corps. *In re Shugrue*, 324.
2. A person under twenty-one years of age cannot be enlisted in the marine corps without the consent of his parent, where such parent retains his right of control. *Id.*

MORTGAGES. See *Encumbrances, Priority of*.

MUNICIPAL CORPORATIONS. See *Negligence*.

1. The District of Columbia, notwithstanding its non-representative form of government, is liable to an individual for any accident resulting from its failure to keep the streets and highways in such a condition as will render them safe for public use (following Barnes' case, 91 U. S., 540). But this liability is no greater and no less than that of any municipal corporation which receives its grant of power from the sovereign. *Clark v. The District*, 79.
2. The District is not required to keep the streets clear of the millions of tons of snow falling upon them during the winter; such an undertaking would be incapable of performance, but if it have actual notice of the dangerous condition of any particular place, from the accumulation of snow and ice, and neglect to remedy it, it becomes liable for consequent injuries. *Id.*
3. It had been alternately snowing and raining for several days prior to the day when the plaintiff slipped and fell by reason of the accumulated snow and ice upon the street crossing. The streets, in consequence of the protracted storm, were all in a perilous condition for travel, but there was no proof that the District had any more notice of the unsafe condition of the street at the point where the accident occurred than at any other point; or any other notice than such as arises from the well known result to the streets everywhere of a severe and protracted snow storm.
Held, That this was not such notice as would render the District liable. *Id.*
4. A corporate seal is not necessary to the validity of the contract of a municipal corporation. *The District v. Johnston*, 120.
5. By an act of Congress (May 15, 1820), the corporation of Washington was given express power to "erect, repair and regulate public wharves, * * * and to regulate the manner of erecting, and the rates of wharfage at private wharves." Under this power, instead of appropriating money to be expended in the construction of a wharf, the corporation contracted with the defendants, that if the latter would erect a wharf at their own expense, and deliver it up at the end of ten years, the corporation would allow them the use of the wharf for ten years, upon the further consideration of the annual payment of a thousand dollars, reserving the right on the part of the corporation to take possession of the wharf upon paying the cost, or a proportional part of the cost, with reference to the time of occupancy by the defendants.

Held, A legitimate exercise of the power to erect wharves. *Id.*

6. The chief engineer of the army has no power to issue a license to erect wharves in the District of Columbia; whatever power the commissioners of the Federal city, to some of whose powers he succeeded, may have had in that respect, expired when Congress assumed legislative jurisdiction over the District. *Id.*

MUNICIPAL CORPORATIONS (*continued*).

7. A municipality is not liable for damage to private property, occasioned by the accumulation of water within a square left below grade in making a public improvement. *Herring v. District*, 572.

8. In the process of public improvements, a municipality so raised the grade of certain streets as to leave the enclosed square below the new grade thus established, and turned a natural stream into a sewer in such a way as to leave the old channel exposed within the limits of the square. The owner of property within the square did not conform his premises to the new grade.

Held, That the municipality was not liable for damage to such property occasioned by the accumulation of water within the square, notwithstanding one of the streets crossed the old channel, and the raising the grade of that street destroyed a former culvert through which the stream had flowed. *Id.*

NEGLIGENCE. See *Municipal Corporations*, 1, 2, 3.

The District authorities had covered a well located on the public highway in which was placed a pump for the use of the public, with a wooden platform, and upon this was laid a brick pavement even with the level of the sidewalk. Plaintiff had frequently used the pump, and there was nothing to lead one to suspect any danger or defect about it. On the day in question, while in the act of using the pump, the pavement over the platform suddenly gave way, precipitating plaintiff to the bottom of the well. It was in evidence that the District authorities had not for nine years made any examination or repair of the platform. By the court below it was held that express notice must be brought home to the District of the defect in the covering of the well; but it was—

Held, on appeal, that the District was bound to know that the platform was of perishable material, and to watch over it and keep it in repair; that having left it without examination for nine years, until it became a man trap, with the assurance to the public of security, there was such delinquency as rendered the District liable in damages. *Sherwood v. The District*, 276.

NEW TRIAL, MOTION FOR. See *Pleading and Practice*, 13.

NUISANCES. See *Board of Health*, 12, and *Pleading and Practice*, 14.

ORPHANS' COURT. See *Executors and Administrators*.

PATENT LAW.

1. The decision of the Commissioner of Patents on the right of an applicant to receive a patent, is an act of executive discretion, and cannot be interfered with by mandamus. *U. S., ex rel. Hoe, v. Butterworth*, 229.
2. So, too, after the decision has been made and communicated to the applicant, and at any time before the issue of the patent for the

PATENT LAW (*continued*).

- signature of the Secretary of the Interior, it is within the Commissioner's discretion to reconsider his decision and to make a contrary one. *Id.*
3. But if he does not, then his executive discretion being exhausted in deciding that the applicant is entitled to a patent, there remains but the ministerial duty to issue it; and to compel the performance of this act, in case of refusal, mandamus is the proper remedy. *Id.*
 4. An appeal from the decision of the Commissioner of Patents upon the right of an applicant to receive a patent, lies directly from him to this court in General Term, and not to the Secretary of the Interior; the latter has not appellate or revisory power over the decision of the Commissioner upon that question. *Id.*
 5. In legal effect the action of an applicant or his attorney is the same. *In re Hatchman*, 288.
 6. Where one of the claims in an original application was rejected upon reference to certain patents, and the applicant, by his attorney, orders the same to be erased, and thus obtains and accepts a patent for the residue of his claims, there has been no inadvertence, accident or mistake within the meaning of the patent law, and the patentee is not entitled to a reissue covering the claim before erased. *Id.*
 7. The purchase of a product does not constitute the purchaser an infringer of the patent for the machine or process by which it is produced. *Brown v. The District*, 502.
 8. The advantages claimed under patent No. 94,062, issued August 24, 1869, for the paving block therein described, are purely fanciful, and the block has no patentable novelty. *Id.*
 9. Patent No. 101,590, also for paving block, is likewise void under either of the two constructions which the claim is susceptible of. Construed as a claim for a new arrangement of paving blocks of a known shape without reference to their material, it was anticipated by the English patent granted Lindsay in June, 1825. Construed as a claim for the application of a known arrangement to a new material, it would not be a patentable novelty. *Id.*

PLEADING AND PRACTICE. See *Appeals*; *Autrefois Acquit*; *Bill of Exceptions*; *Patent Law*, 4; *Referee*; *Rehearing*; *Seventy-Third Rule*; *Slander*.

1. A justice having no previous connection with a case, except to grant, at Special Term, a preliminary injunction, on *ex parte* affidavits, is not thereby disqualified to sit upon the final hearing of the case in General Term. *Walter v. Ward*, 65.
2. A suit may be maintained in the name of the United States, for the use of several legatees, against the principal and sureties on an executor's bond; it is not necessary that a separate suit should be brought to the use of each party interested. *U. S., use of Alexander*, v. *Ritchie*, 162.

PLEADING AND PRACTICE (*continued*).

3. In a suit upon a bond, where the bond is filed as a public record, it is unnecessary to make profert of it in the declaration. *Id.*
 4. The neglect to make profert is a matter of form and not of substance, and cannot be taken advantage of on general demurrer. *Id.*
 5. This court will not listen to any mere matters of form on demurrer; they were at common law subject to special demurrer, and by the rules of this court all special demurrers are virtually abolished. *Id.*
 6. A declaration which states the facts necessary to be stated to make a case, is not demurrable because it contains matters of evidence; the latter is merely surplusage. *Id.*
 7. A *fi. fa.* cannot issue on a judgment of this court after twelve years have elapsed since the last proceeding taken to enforce the judgment. *Thompson v. Beveridge*, 170.
 8. T., who was tenant *pur autre vie*, leased to G.; pending the lease, *cestui que vie* dies; T. continues collecting the rent, receipting therefor as "agent for the heirs."
- Held*, That T. could not maintain an action in his own name for rent accruing after the death of *cestui que vie*. *Tyler v. Gilmore*, 189.
9. Where the declaration consists of the common counts, with a bill of particulars annexed, no recovery can be had for services not included among the items of charges contained in the bill of particulars. The latter defines the application of the common counts, and is a part of the pleading under our system. It apprises the defendant what it is the plaintiff expects to recover on, and if the bill contains no such item, no recovery can be had, even if the services were in fact rendered. *Fague v. Corcoran*, 199.
 10. But the court may, on a new trial being granted, allow an amendment of the bill of particulars, so as to include such a charge. *Id.*
 11. It is in the discretion of the court to refuse all instructions prayed for by either party, and to state the law in its own language. *Carpenter v. Railroad Co.*, 225.
 12. On exceptions for error in a part of the charge to the jury, the court will look at the whole charge, and if it see that in the very next paragraph an apparent error is corrected, the exception will not be sustained. *Id.*
 13. The German Evangelical Concordia Church were dispossessed of property under a decree and writ of assistance of this court. An appeal was taken to the Supreme Court of the United States, where the decree was reversed. The mandate directed to this court described the appellants as the German Lutheran Evangelical Concordia Church, and under this title they applied to this court for a writ of restitution to restore them the possession.

Held, That the record showed no such party to the suit, and that the writ must be refused; but it *seems* that if the petitioner had shown itself to be the successor to the German Evangelical Concordia

PLEADING AND PRACTICE (*continued*).

Church, the writ would have issued. *Concordia Church v. Ebbinghaus*, 261.

14. Where a party makes a motion for a new trial within four days after the rendition of the verdict, he is entitled to have his motion passed upon by the court, and if, in the meantime, judgment has been entered, it remains subject to be set aside if a new trial be granted. So, too, with the motion in arrest of judgment if made in proper time. The fact that no suspending undertaking or bond is given, cannot affect the right to have those motions passed upon by the court. The giving of this suspending bond is not a condition precedent to the motion. The party takes only the risk of an execution being issued and a levy and sale made in the meantime. But if the motion for a new trial and the motion in arrest of judgment have been heard, and pending these motions, no levy has been made, then, if the party appeal and give his appeal bond, all further proceedings under the execution are stayed. *Hetzel v. Railroad Co.*, 338.
15. An information charging that the defendant "did then and there commit, create and maintain a nuisance injurious to health, consisting of crushing, grinding and burning of shells, whereby noisome stenches and noxious gases arise and are generated," charges a nuisance at common law. *The District v. The Gas Light Company*, 343.
16. When an inferior court is proceeding beyond or without its jurisdiction, the writ of *certiorari* is the proper remedy, but not for mere matters of form and procedure; and it seems that the writ ought never to issue where there is a right of appeal, unless the jurisdiction is called in question, or unless some specific reason is shown why the writ should issue, as that a party has lost his right of appeal through mistake, or inadvertence or the like. *Id.*
17. An objection that the information contains the signature of the prosecuting attorney in printed type, instead of the same being written, is one which relates merely to a matter of form and procedure, which is amendable. *Id.*

POLICE COURT. See *Board of Health*, 1.

1. Inasmuch as the jurisdiction of the police court to convict an accused of an offence against the criminal laws of the United States, without a trial by jury, has been acquiesced in for nearly fourteen years, this court declines, at this, the first time that the jurisdiction has been formally assailed, to enter upon the examination of the question, but passes the prisoner on to the Supreme Court of the United States, if he should think proper to appeal to that tribunal. At the same time, it is intimated that, if the police court were just entering on its existence, this court would feel bound to consider the question, and would do so, perhaps, with some prepossession against the jurisdiction. *In re George Fry*, 135.

POLICE COURT (*continued*).

2. Under the act creating the police court, the punishment is the criterion by which the offence is to be considered infamous. Offences which are punishable only by imprisonment in the District jail are, by this act, non-infamous offences, as petit larceny and the receiving of stolen goods amounting to less than \$35 in value, are such offences, and they may be prosecuted in the police court by information, without being, on that account, obnoxious to the provision of Article V of the Constitution of the United States, which declares that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." *Id.*

PRINCIPAL AND AGENT. See *Contracts*.

1. One cannot be agent for the purchaser and agent for the seller at the same time. The duties are incompatible, and a contract for such employment is utterly void. *Sunderland v. Kilbourn*, 506.
2. Facts considered which entitle agents to compensation for the care and management of property in their charge, and the measure thereof fixed by the court in view of the circumstances of the case. *Id.*

PROBABLE CAUSE, EVIDENCE OF. See *Malicious Prosecution*.**PROFERT.** See *Pleading and Practice*, 2.**PROMISSORY NOTES.** See *Bills and Notes*.**PROTEST, NOTICE OF.** See *Bills and Notes*.**REFEREE.**

An agreement of parties, by their attorneys, to refer a pending cause to a special referee, "whose award, when approved by the court, is to be its judgment," is not within the Maryland act, and if the court disapprove the award, and make an order setting it aside, such order is not appealable. *Belmont v. Railroad Company*, 357.

REHEARING. See *Amendments*, 1.

1. In a case involving a question of law of great public interest and of great difficulty this court has sometimes directed a rehearing before the full court, but it has never been its practice so to refer questions of fact which have been once fully discussed. *Walter v. Ward*, 65.
2. In a case which was heard before more than a legal quorum of the court, and which involved merely the application of well-settled and undisputed principles of law to the facts, the court announced its judgment without rendering an opinion.

Held, That the fact that no opinion was rendered afforded no ground to grant a motion for a rehearing before a full court. *Id.*

REVISED STATUTES, CONSTRUCTION OF.

It is a settled rule that the Revised Statutes are to be construed in the light of the original statutes from which they are taken. *U. S., ex rel. Hoe, v. Butterworth*, 229.

SALES; ADVERTISING UNDER DEEDS OF TRUST.

1. Where the defaulting owner of property covered by a deed of trust given to secure the payment of a debt, agrees that the advertisement of sale may be for a shorter period than that expressed in the deed, he is estopped from afterwards objecting that the provision made in the deed as to advertising was not followed. *Maulsby v. Barker*, 165.
2. *Quære*, Whether, if, before the occurrence of the day of sale appointed by the original advertisement, the day of sale is changed to a later day, the property must be readvertised for the whole period mentioned in the deed. *Id.*

SEVENTY-THIRD RULE.

In an action on a promissory note, brought by the cashier of a bank in his own name, the court will refuse judgment on a motion under the seventy-third rule, where the affidavit accompanying the declaration, although showing title in the bank, does not contain any allegation to show that the plaintiff afterwards became holder of the note. *James v. Davis*, 158.

SLANDER.

1. Words which do not disparage the character of the plaintiff are not actionable, although special damage flow from the uttering of them. *Knight v. Blackford*, 177.
2. Where A tells B that C, a Government clerk, had spoken disrespectfully of his chief, D, and this coming to the ears of D, he discharges C from office, it *seems* that the damages are too remote to enable C to maintain an action of slander against A. *Id.*

SPECIAL ASSESSMENT TAX. See *Evidence*, 14, 15, 16.

1. The words in the act of Congress of February 21, 1871, which imposed upon the Board of Public Works the duty of assessing a proportion of the cost of street improvements "upon the property adjoining and to be specially benefited by the improvement," were used merely as a *designation of the property*, and not as a condition on which a charge was to be made upon it. To hold these words to mean that an assessment could only be made upon the property adjoining, *provided* it be benefited by the improvement, would be equivalent to inserting in the statute a limitation which would have been distinctly stated if intended. *U. S., ex rel. Henderson, v. Edmonds*, 142.
2. Hence, the Board of Public Works, in making an assessment upon adjoining property under the act of February 21, 1871, was not charged with the duty of inquiring whether the property was benefited, but only to determine the cost of the improvement, and to distribute this cost between the owners of the adjoining property and the District, to do which it had only to ascertain the frontage by measurement and whether the property was specially exempted from assessments. There was no provision

SPECIAL ASSESSMENT TAX (*continued*).

that the board was to act as a jury to determine whether the property was benefited; the assessment did not depend upon that condition. *Id.*

3. It follows, therefore, that it is not in the power of the Commissioners, when they come to act under the statutes (Acts of Congress of June 19, 1878, and June 27, 1879,) authorizing them to correct erroneous or excessive assessments, to consider anything but the elements that go to make up the charge. They cannot consider or attempt to adjudicate whether the property was benefited. *Id.*

STATUTE OF LIMITATIONS. See *Limitation of Actions*.

STATUTES OF ENGLAND.

The following, among others, referred to, commented on or explained:
Statute of 8 Anne, ch. 45. See *Landlord and Tenant*, 1.

21 James, ch. 1, sec. 16. See *Limitation of Actions*.

STATUTES OF MARYLAND.

The following, among others, referred to, commented on or explained:
Act of 1729. See *Limitation of Actions*, 2.

1785. Chap. 27, Sec. 6. See *Insane Persons*, 3.

1798. See *Limitation of Actions*.

STATUTES OF THE UNITED STATES.

The following, among others, referred to, commented on or explained:

Act of May 15, 1820. See *Municipal Corporations*, 5.

Mar. 3, 1863. *Constables, Bonds of*.

Feb. 5, 1867. *Baltimore & Potomac Railroad*.

Mar. 2, 1867. *Bankruptcy*.

Feb. 21, 1871. *Mandamus*, 1.

June 18, 1874. *Labels and Trade-Marks*, 1.

June 7, 1878. *Constables, Bonds of*.

June 19, 1878. *Special Assessments*.

June 29, 1879. *Special Assessments*.

Apr. 24, 1880. *Board of Health*, 1.

Revised Statutes. Sec. 723. See *Equity*, 5.

1418. *Marine Corps*.

1419. *Marine Corps*.

4986. See *Supreme Court Dist. of Col.*, 1.

Revised Statutes, D. C. Sec. 722. *Supreme Court Dist of Col.*, 3.

678. *Landlord and Tenant*, 1.

STREETS AND HIGHWAYS. See *Municipal Corporations*, 1, 2, 3, 5, 6;
Board of Public Works.

SUPREME COURT DISTRICT OF COLUMBIA.

1. Whether the general superintending power granted by section

SUPREME COURT DISTRICT OF COLUMBIA (*continued.*)

4986, R. S. U. S., to the Circuit Court of the United States over questions arising in the District Court when sitting as a court of bankruptcy, is possessed also by this court sitting in General Term over the Special Term when holding a court of bankruptcy, *quære*. *In re Kirk's Petition*, 116.

2. But even though this court possesses such power, it cannot interfere, except on appeal, to review an order passed by the Special Term holding a court of bankruptcy, when such order is appealable. *Id.*
3. By section 772, R. S. D. C., any order passed in a cause by any Special Term of this court, is appealable to the General Term without regard to the amount involved, if it affects the merits of the controversy; hence, the provision of the Bankrupt Act providing for appeals from the district courts to the circuit courts, where the matter involved is over five hundred dollars, does not apply to this court, for a general act does not apply to a case which is governed by a special act. *Id.*

TAX TITLES. See *Bona Fide Purchasers*.

1. A tax deed on its face amounts to nothing as proof of title until authority for making the deed is shown. *Keefe v. Bramhall*, 551.
2. A tax deed void on its face does not even give a color of title. *Id.*
3. Recording a void tax deed, and paying the taxes on the property, are not acts amounting to adverse possession. *Id.*
4. Equity will not presume strongly in favor of a tax title. A party who purchases a tax title, purchases with full knowledge that he is running a risk, and he is bound to know whether the tax title is good or not. He buys with his eyes open, and to no person does the rule *caveat emptor* apply more than to such a purchaser. *Id.*

USURY. See *Building Associations*, 2.

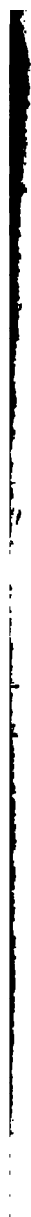
1. An agreement to pay usury is a mere nullity, and cannot be set up as the consideration of an agreement. *Brown v. Clark*, 185.
2. Defendant had given a note drawing ten per cent. interest per annum. After the note became due, there was endorsed upon it the following: "It is agreed and understood between the parties to the within note, that it is to run at the rate of five per cent. a month." It was contended that the plaintiff, by agreeing to take usury, had forfeited his right to recover anything but the principal of the note.
Held, That the new agreement to pay usurious interest, though void, did not affect the original contract to pay legal interest, and that the plaintiff was therefore entitled to recover the principal, with accrued interest, at the rate of ten per cent. *Id.*

WHARVES. See *Municipal Corporations*, 5, 6.

WITNESSES.

1. The credibility of a witness is open to impeachment by proof that he had made a statement before a Congressional committee on a designated day at variance with his present testimony, but this cannot be done by reading for that purpose the alleged testimony from a page in an unauthenticated book styled a Congressional investigation. *Langdon v. Evans*, 1.
2. A conviction and sentence for a felony in the State of New York does not render the party incompetent as a witness in the courts of this District, that State being, *quoad hoc*, a foreign jurisdiction. *Id.*









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